(2)

90-634

No. _____

IN THE

Supreme Court of the United States

October Term, 1990

DAN COHEN,

Petitioner,

vs.

COWLES MEDIA COMPANY, d/b/a Minneapolis Star and Tribune Company, and NORTHWEST PUBLICATIONS, INC.,

Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

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APPENDIX

STATE OF MINNESOTA
IN SUPREME COURT

C8-88-2631, C0-88-2672

Court of Appeals — Simonett, J.

Dissenting, Yetka, J. and Kelley, J.
Took no part, Popovich, C.J.

Dan Cohen, petitioner,
Respondent (C8-88-2631, C0-88-2672),

Filed July 20, 1990
Office of Appellate Courts

vs.

Cowles Media Company, d/b/a Minneapolis Star and Tribune Company, petitioner,
Appellant (C8-88-2631),
Defendant (C0-88-2672),

Northwest Publications, Inc., petitioner,
Defendant (C8-88-2631),
Appellant (C0-88-2672).

SYLLABUS

A state cause of action for fraudulent misrepresentation or breach of contract will not lie in this case for a newspaper's breach of its reporter's promise of anonymity given to a news source.

Affirmed in part and reversed in part.

Heard, considered, and decided by the court en banc.

OPINION

SIMONETT, Justice.

This case asks whether a newspaper's breach of its reporter's promise of anonymity to a news source is legally enforceable. We conclude the promise is not enforceable, neither as a breach of contract claim nor, in this case, under promissory estoppel. We affirm the court of appeals' dismissal of plaintiff's claim based on fraudulent misrepresentation, and reverse the court of appeals' allowance of the breach of contract claim.

Claiming a reporter's promise to keep his name out of a news story was broken, plaintiff Dan Cohen sued defendants Northwest Publications, Inc., publisher of the St. Paul Pioneer Press Dispatch (Pioneer Press), and Cowles Media Company, publisher of the Minneapolis Star and Tribune (Star Tribune). The trial court ruled that the First Amendment did not bar Cohen's contract and misrepresentation claims. The jury then found liability on both claims and awarded plaintiff $200,000 compensatory damages jointly and severally against the defendants. In addition, the jury awarded punitive damages of $250,000 against each defendant.

The court of appeals (2-1 decision) agreed that plaintiff's claims did not involve state action and therefore did not implicate the First Amendment; further, that even if First Amendment rights were implicated, those rights were outweighed by compelling state interests and, in any event, such rights were waived by the newspapers. The appeals panel ruled, however, that misrepresentation had not been proven as a matter of law and, therefore, set aside the punitive damages award. The panel upheld the jury's finding of a breach of contract and affirmed the award of $200,000

compensatory damages. *Cohen v. Cowles Media Co.*, 445 N.W.2d 248 (Minn. App. 1989). We granted petitions for further review from all parties.

On October 27, 1982, in the closing days of the state gubernatorial election campaign, Dan Cohen separately approached Lori Sturdevant, the Star Tribune reporter, and Bill Salisbury, the Pioneer Press reporter, and to each stated in so many words:

> I have some documents which may or may not relate to a candidate in the upcoming election, and if you will give me a promise of confidentiality, that is that I will be treated as an anonymous source, that my name will not appear in any material in connection with this, and you will also agree that you're not going to pursue with me a question of who my source is, then I'll furnish you with the documents.

Sturdevant and Salisbury were experienced reporters covering the gubernatorial election and knew Cohen as an active Republican associated with the Wheelock Whitney campaign. Cohen told Sturdevant that he would also be offering the documents to other news organizations. Neither reporter informed Cohen that their promises of confidentiality were subject to approval or revocation by their editors. Both reporters promised to keep Cohen's identity anonymous, and both intended to keep that promise. At trial Cohen testified he insisted on anonymity because he feared retaliation from the news media and politicians. Cohen turned over to each reporter copies of two public court records concerning Marlene Johnson, the DFL candidate for lieutenant governor. The first was a record of a 1969 case against Johnson for three counts of unlawful

assembly, subsequently dismissed; the second document was a 1970 record of conviction for petit theft, which was vacated a year later.[1]

Both newspapers, on the same day, then interviewed Marlene Johnson for her explanation and reaction. The Star Tribune also assigned a reporter to find the original court records in the dead-storage vaults. The reporter discovered that Gary Flakne, known to be a Wheelock Whitney supporter, had checked out the records a day earlier; no one, before Flakne, had looked at the records for years. The reporter called Flakne and asked why he had checked out the records. Flakne replied, "I did it for Dan Cohen." The Star Tribune editors thereafter conferred and decided to publish the story the next day including Dan Cohen's identity. Acting independently, the Pioneer Press Dispatch editors also decided to break their reporter's promise and to publish the story with Cohen named as the source.[2]

The decision to identify Cohen in the stories was the subject of vigorous debate within the editorial staffs of the two newspapers. Some staff members argued that the reporter's promise of confidentiality should be honored at all costs.

[1]Cohen then met with reporters for the Associated Press and WCCO-TV. They, too, promised Cohen anonymity and received the court documents. The Associated Press published the story and honored its promise. WCCO-TV did not run the story.

[2]The court records obtained by Cohen did not contain the underlying facts of the unlawful assembly and petit theft charges. Apparently only after the reporters had gone to Johnson for an explanation did the full story become known. Johnson explained (and the newspapers duly reported in their stories) that the arrest for unlawful assembly (later dismissed) was for protesting the city's alleged failure to hire minority workers on construction projects, while the petit theft incident (theft up to $150) was for leaving a store with $6 of sewing materials at a time when Johnson was upset because of her father's death. These circumstances, of which Cohen was apparently unaware and which cast a somewhat different light on the two incidents, were likely to set in motion a boomerang effect. This suggestion of a boomerang may have prompted some of the editors to believe that Cohen's identity was newsworthy.

Some contended that the Johnson incidents were not newsworthy and did not warrant publishing, and, in any case, if the story was published, it would be enough to identify the source as a source close to the Whitney campaign. Other editors argued that not only was the Johnson story newsworthy but so was identification of Cohen as the source; that to attribute the story to a veiled source would be misleading and cast suspicion on others; and that the Johnson story was already spreading throughout the news media community and was discoverable from other sources not bound by confidentiality. Then, too, the Star Tribune had editorially endorsed the Perpich-Johnson ticket; some of its editors feared if the newspaper did not print the Johnson story, other news media would, leaving the Star Tribune vulnerable to a charge it was protecting the ticket it favored. Salisbury and Sturdevant both objected strongly to the editorial decisions to identify Cohen as the source of the court records. Indeed, Sturdevant refused to attach her name to the story.

Promising to keep a news source anonymous is a common, well-established journalistic practice. So is the keeping of those promises. None of the editors or reporters who testified could recall any other instance when a reporter's promise of confidentiality to a source had been overruled by the editor. Cohen, who had many years' experience in politics and public relations,[3] said this was the first time in his experience that an editor or a reporter did not honor a promise to a source.

[3]Cohen would qualify as a public figure. For many years Cohen had been active in politics as a campaign worker, a candidate, and as an elected public official. In 1982 he was a Whitney supporter and was employed as a public relations officer with a Minneapolis advertising firm which was handling some work for the Whitney campaign. Additionally, he had been a lawyer, stock broker, public relations official, author, and freelance newspaper columnist.

The next day, October 28, 1982, both newspapers published stories about Johnson's arrests and conviction. Both articles published Cohen's name, along with denials by the regular Whitney campaign officials of any connection with the published stories. Under the headline, *Marlene Johnson arrests disclosed by Whitney ally*, the Star Tribune also gave Johnson's explanation of the arrests and identified Cohen as a "political associate of IR gubernatorial candidate Wheelock Whitney" and named the advertising firm where Cohen was employed. The Pioneer Press Dispatch quoted Johnson as saying the release of the information was "a last-minute smear campaign."

The same day as the two newspaper articles were published, Cohen was fired by his employer. The next day, October 29, a columnist for the Star Tribune attacked Cohen and his "sleazy" tactics, with, ironically, no reference to the newspaper's own ethics in dishonoring its promise. A day later the Star Tribune published a cartoon on its editorial page depicting Dan Cohen with a garbage can labeled "last minute campaign smears."

Cohen could not sue for defamation because the information disclosed was true. He couched his complaint, therefore, in terms of fraudulent misrepresentation and breach of contract. We now consider whether these two claims apply here.

I.

First of all, we agree with the court of appeals that the trial court erred in not granting defendants' post-trial motions for judgment notwithstanding the verdict on the misrepresentation claim.

For fraud there must be a misrepresentation of a past or present fact. A representation as to future acts does not

support an action for fraud merely because the represented act did not happen, unless the promisor did not intend to perform at the time the promise was made. *Vandeputte v. Soderholm*, 298 Minn. 505, 508, 216 N.W.2d 144, 147 (1974). Cohen admits that the reporters intended to keep their promises, as, indeed, they testified and as their conduct confirmed. Moreover, the record shows that the editors had no intention to reveal Cohen's identity until later when more information was received and the matter was discussed with other editors. These facts do not support a fraud claim. For this reason and for the other reasons cited by the court of appeals, we affirm the court of appeals' ruling. Because the punitive damages award hinges on the tort claim of misrepresentation, it, too, must be set aside as the court of appeals ruled.

II.

A contract, it is said, consists of an offer, an acceptance, and consideration. Here, we seemingly have all three, plus a breach. We think, however, the matter is not this simple.

Unquestionably, the promises given in this case were intended by the promisors to be kept. The record is replete with the unanimous testimony of reporters, editors, and journalism experts that protecting a confidential source of a news story is a sacred trust, a matter of "honor," of "morality," and required by professional ethics. Only in dire circumstances might a promise of confidentiality possibly be ethically broken,[4] and instances were cited where

[4]Two possible instances where a promise of confidentiality might be ethically breached have been suggested: (1) where disclosure is required to correct misstatements made by the source; and (2) where failure to reveal the source may subject the newspaper to substantial libel damages. *See* M. Langley & L. Levine, *Broken Promises*, Colum. Journalism

a reporter has gone to jail rather than reveal a source. The keeping of promises is professionally important for at least two reasons. First, to break a promise of confidentiality which has induced a source to give information is dishonorable. Secondly, if it is known that promises will not be kept, sources may dry up. The media depend on confidential sources for much of their news; significantly, at least up to now, it appears that journalistic ethics have adequately protected confidential sources.

The question before us, however, is not whether keeping a confidential promise is ethically required but whether it is legally enforceable; whether, in other words, the law should superimpose a legal obligation on a moral and ethical obligation. The two obligations are not always coextensive.

The newspapers argue that the reporter's promise should not be contractually binding because these promises are usually given clandestinely and orally, hence they are often vague, subject to misunderstanding, and a fertile breeding ground for lawsuits. *See Ruzicka v. Conde Nast Publications, Inc.*, 733 F. Supp. 1289, 1300-01 (D. Minn. 1990) (a promise not to make a source identifiable found too vague to be enforceable). Perhaps so, and this may be a factor to weigh in the balance; but this objection goes only to problems of proof, rather than to the merits of having such

Rev. 21 (July/August 1988). As an example of the first instance, the authors cite Oliver North's public hearing testimony that the leaking of information about the *Achille Lauro* hijacking seriously compromised intelligence activities, whereupon Newsweek disclosed that North himself was the anonymous source of the leak. *Id.* In some civil libel actions, says the article, where the reporter refuses to reveal his or her confidential source of allegedly defamatory information, the court has threatened to enter a default judgment against the defendant newspaper, thereby exposing the newspaper to heavy damages. *Id.* at 22.

Another difficulty sometimes encountered is that the newspaper, being free to state who is *not* the confidential source, may enable members of the public, by a process of elimination, to identify the source. *Id.*

a cause of action at all. Moreover, in this case at least, we have a clear-cut promise.

The law, however, does not create a contract where the parties intended none. *Linne v. Ronkainen*, 228 Minn. 316, 320, 37 N.W.2d 237, 239 (1949). Nor does the law consider binding every exchange of promises. *See, e.g.*, Minn. Stat. ch. 553 (1988) (abolishing breaches of contract to marry); *see also* Restatement (Second) of Contracts §§ 189-91 (1981) (promises impairing family relations are unenforceable). We are not persuaded that in the special milieu of media newsgathering a source and a reporter ordinarily believe they are engaged in making a legally binding contract. They are not thinking in terms of offers and acceptances in any commercial or business sense. The parties understand that the reporter's promise of anonymity is given as a moral commitment, but a moral obligation alone will not support a contract. *See Cruickshank v. Ellis*, 178 Minn. 103, 107, 226 N.W. 192, 194 (1929). Indeed, a payment of money which taints the integrity of the newsgathering function, such as money paid a reporter for the publishing of a news story, is forbidden by the ethics of journalism.

What we have here, it seems to us, is an "I'll-scratch-your-back-if-you'll-scratch-mine" accommodation. The source, for whatever reasons, wants certain information published. The reporter can only evaluate the information after receiving it, which is after the promise is given; and the editor can only make a reasonable, informed judgment after the information received is put in the larger context of the news. The durability and duration of the confidence is usually left unsaid, dependent on unfolding developments; and none of the parties can safely predict the consequences of

publication. *See supra* note 4. Each party, we think, assumes the risks of what might happen, protected only by the good faith of the other party.

In other words, contract law seems here an ill fit for a promise of news source confidentiality. To impose a contract theory on this arrangement puts an unwarranted legal rigidity on a special ethical relationship, precluding necessary consideration of factors underlying that ethical relationship. We conclude that a contract cause of action is inappropriate for these particular circumstances.

III.

But if a confidentiality promise is not a legally binding contract, might the promise otherwise be enforceable? In *Christensen v. Minneapolis Mun. Employees Retirement Bd.*, 331 N.W.2d 740, 747 (Minn. 1983), we declined to apply a "conventional contract approach, with its strict rules of offer and acceptance" in the context of public pension entitlements, pointing out this approach "tends to deprive the analysis of the relationship between the state and its employees of a needed flexibility." We opted instead for a promissory estoppel analysis. The doctrine of promissory estoppel implies a contract in law where none exists in fact. According to the doctrine, well-established in this state, a promise expected or reasonably expected to induce definite action by the promisee that does induce action is binding if injustice can be avoided only by enforcing the promise.[5]

[5] *AFSCME Councils 6, 14, 65 and 96, AFL-CIO v. Sundquist*, 338 N.W.2d 560, 568 (Minn. 1983), *appeal dismissed, Minneapolis Police Relief Ass'n v. Sundquist*, 466 U.S. 933 (1984); *Grouse v. Group Health Plan, Inc.*, 306 N.W.2d 114, 116 (Minn. 1981) (a health clinic reneging on a job offer to a pharmacist who had quit his job and turned down another job in reliance on the clinic's offer); *Northwestern Bank of*

In our case we have, without dispute, the reporters' unambiguous promise to treat Cohen as an anonymous source. The reporters expected that promise to induce Cohen to give them the documents, which he did to his detriment. The promise applied only to Cohen's identity, not to anything about the court records themselves.

We are troubled, however, by the third requirement for promissory estoppel, namely, the requirement that injustice can only be avoided by enforcing the promise. Here Cohen lost his job; but whether this is an injustice which should be remedied requires the court to examine a transaction fraught with moral ambiguity. Both sides proclaim their own purity of intentions while condemning the other side for "dirty tricks." Anonymity gives the source deniability, but deniability, depending on the circumstances, may or may not deserve legal protection. If the court applies promissory estoppel, its inquiry is not limited to whether a promise was given and broken, but rather the inquiry is into all the reasons why it was broken.

Lurking in the background of this case has been the newspapers' contention that any state-imposed sanction in this case violates their constitutional rights of a free press

Commerce v. Employers' Life Ins. Co. of America, 281 N.W.2d 164, 166 (Minn. 1979) (a life insurer breaching a promise to notify a bank, which had taken the policy as collateral, of a default on premiums, resulting in lapse of the policy); *see also* Restatement (Second) of Contracts § 90(1) (1981). The measure of damages also appears to be more flexible than for breach of contract. ("The remedy granted for breach may be limited as justice requires." *Id.*)

This theory was not briefed by the parties but it surfaced during oral argument.

and free speech.[6] Under the contract analysis earlier discussed, the focus was more on whether a binding promise was intended and breached, not so much on the contents of that promise or the nature of the information exchanged for the promise. *See* Restatement (Second) of Contracts, ch. 8, introductory note (1981) ("In general, parties may contract as they wish, and courts will enforce their agreements without passing on their substance."). Thus the court of appeals, using a contract approach, concluded that applying "neutral principles" of contract law either did not trigger First Amendment scrutiny or, if it did, the state's interest in freedom of contract outweighed any constitutional free press rights. 445 N.W.2d at 254-57.[7] Because we decide that contract law does not apply, we have not up to now had

[6]*New York Times v. Sullivan*, 376 U.S. 254 (1964), holds that a state may not apply a state rule of law to impose impermissible restrictions on the federal constitutional freedoms of speech and press. The test is not the form which the state action takes—such as in this case, breach of contract or promissory estoppel—but, "whatever the form, whether such power has in fact been exercised." *Id.* at 265.

The defendant newspapers rely on *New York Times* and its progeny, plus *Shelley v. Kraemer*, 334 U.S. 1 (1948), where state law enforcement of a private covenant was held to violate constitutional rights of third parties. Plaintiff, on the other hand, relies on cases such as *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984); *Snepp v. United States*, 444 U.S. 507 (1980); and *The Florida Star v. B. J. F.*, — U.S. —, 109 S.Ct. 2603 (1989), to make his argument that there are occasions where the First Amendment allows restraints on true information, especially when the restraint was voluntarily assumed by the newspaper or when the information was "unlawfully obtained" by the newspaper.

[7]The doctrine of "neutral principles," for example, has been used to permit state contract and property law to decide ownership of church property when church members are divided over doctrine, notwithstanding the First Amendment prohibition against state entanglement in religion. *See Jones v. Wolf*, 443 U.S. 595, 603-04 (1979); *but cf. Kaufmann v. Sheehan*, 707 F.2d 355, 358-59 (8th Cir. 1983) (plaintiff's employment as a priest, while having secular aspects, involved "inherently religious issues" to be left to church authorities). Even so, as the Restatement goes on to say in the passage quoted above in the text, there may be instances where "the interest in freedom of contract is outweighed by some overriding interest of society * * *." Restatement (Second) of Contracts, ch. 8, introductory note (1981).

to consider First Amendment implications. But now we must. Under a promissory estoppel analysis there can be no neutrality towards the First Amendment. In deciding whether it would be unjust not to enforce the promise, the court must necessarily weigh the same considerations that are weighed for whether the First Amendment has been violated. The court must balance the constitutional rights of a free press against the common law interest in protecting a promise of anonymity.

For example, was Cohen's name "newsworthy"? Was publishing it necessary for a fair and balanced story? Would identifying the source simply as being close to the Whitney campaign have been enough? The witnesses at trial were sharply divided on these questions. Under promissory estoppel, the court cannot avoid answering these questions, even though to do so would mean second-guessing the newspaper editors. *See, e.g., Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258 (1974) ("The choice of material to go into a newspaper * * * constitute[s] the exercise of editorial control and judgment," a process critical to the First Amendment guarantees of a free press). Of critical significance in this case, we think, is the fact that the promise of anonymity arises in the classic First Amendment context of the quintessential public debate in our democratic society, namely, a political source involved in a political campaign. The potentiality for civil damages for promises made in this context chills public debate, a debate which Cohen willingly entered albeit hoping to do so on his own terms. In this context, and considering the nature of the political story involved, it seems to us that the law best leaves the parties here to their trust in each other.

We conclude that in this case enforcement of the promise

of confidentiality under a promissory estoppel theory would violate defendants' First Amendment rights. In cases of this kind, the United States Supreme Court has said it will proceed cautiously, deciding only in a "discrete factual context." *The Florida Star v. B.J.F.*, — U.S. —, —, 109 S.Ct. 2603, 2607 (1989). We, too, are not inclined to decide more than we have to decide. There may be instances where a confidential source would be entitled to a remedy such as promissory estoppel, when the state's interest in enforcing the promise to the source outweighs First Amendment considerations, but this is not such a case. Plaintiff's claim cannot be maintained on a contract theory. Neither is it sustainable under promissory estoppel. The judgment for plaintiff is reversed.

Affirmed in part and reversed in part.

POPOVICH, Chief Justice, while presiding at oral argument, took no part in the consideration and decision of this matter.

Cohen v. Cowles Media Co.

YETKA, Justice (dissenting).

I would affirm the court of appeals and allow Cohen to recover on either a contract or promissory estoppel theory. The simple truth of the matter is that the appellants made a promise of confidentiality to Cohen in consideration for information they considered newsworthy. That promise was broken and, as a direct consequence, Cohen lost his job. Under established rules of contract law, the appellants should be responsible for the consequences of that broken promise. The first amendment is being misused to avoid liability under the doctrine of promissory estoppel. The result of this is to

carve out yet another special privilege in favor of the press that is denied other citizens.

I dissent because I believe that the news media should be compelled to keep their promises like anyone else. If they did not intend to keep the promise they made to Cohen, they should not have made it or should have refused to use the proffered information. Alternatively, after accepting the information subject to the confidentiality agreement, the press could have printed the story without revealing the source or could have simply attributed the source to "someone close to the Whitney campaign" without revealing Cohen's name.

I find the consequences of this decision deplorable. First, potential news sources will now be reluctant to give information to reporters. As a result, the public could very well be denied far more important information about candidates for public office relevant to evaluating their qualifications than the rather trivial infractions disclosed here. Second, it offends the fundamental principle of equality under the law.

This decision sends out a clear message that if you are wealthy and powerful enough, the law simply does not apply to you; contract law, it now seems, applies only to millions of ordinary people. It is unconscionable to allow the press, on the one hand, to hide behind the shield of confidentiality when it does not want to reveal the source of its information; yet, on the other hand, to violate confidentiality agreements with impunity when it decides that disclosing the source will help make its story more sensational and profitable. During the Watergate crisis, the press published many pious editorials urging that the laws be enforced equally against everyone, even the President of the United

States. Nevertheless, the press now argues that the law should not apply to them because they alone are entitled to make "editorial decisions" as to what the public should read, see, or hear and whether the source of that information should be disclosed.

The decision in *New York Times v. Sullivan*, 376 U.S. 254 (1964), has not resulted in a more responsible press. In the 19th century, the phrases "scandal sheet" and "yellow journalism" became common adjectives for disreputable publications. It would be tragic if these colorful descriptions regained popular usage because of the practices of a few of the more sensational "journalistic" enterprises which appear to be growing in number and popularity, replacing the great newspapers of the past.

Perhaps it is time in these United States to return to treating the press the same as any other citizen. Let them print anything they choose to print, but make them legally responsible if they break their promises or act negligently in connection with what they print — free of any special protection carved out by *New York Times v. Sullivan* or any of its progeny. The decision of this court makes this a sad day in the history of a responsible press in America. Because I firmly believe that no one should be above the law, including the President of the United States or the news media, I would affirm the court of appeals.

KELLEY, Justice (dissenting).

A majority of this court recently held that a commercial media defendant, who the jury found had done a "hatchet job" with constitutional malice on a public official through distortion and/or omission of established facts and through

unwarranted inference, was immune from tort liability, unlike the rest of the citizens of this state, corporate or private, who would undoubtedly be liable in tort for that type of conduct. I joined the dissent of Justice Yetka in that case. *Diesen v. Hessburg*, 455 N.W.2d 446 (Minn. 1990) (Petition to withdraw pending). In my opinion, the majority today, applying a somewhat different analysis, affords to that same commercial media immunity from liability from an unmistakable breach of contract, although any other corporate or private citizen of this state under similar circumstances would most certainly have been liable in damages for breach of contract.

While I agree with the majority that the trial court erred in not granting the defendants' post-trial motions for judgment notwithstanding the verdict on the misrepresentation claim, I remain unpersuaded by the majority's analysis that, notwithstanding that all of the elements of a legal contract and its breach are here present, the contract is unenforceable because "the parties intended none." It reaches this conclusion even as it concedes that the promises given by the agents and employees of these defendants was intended by them to be kept. *Majority Op.* at 6. Rather than affording Cohen a remedy for the considerable damage he sustained, see Art. I, § 8, Constitution of Minnesota, the majority, it seems to me, engaged in or came very close to engaging in some inappropriate appellate fact finding, to-wit, that each of the parties did not intend a contract and assumed the risk "of what might happen." I conclude that the analysis employed by Judge Short in the majority opinion of the court of appeals, *Cohen v. Cowles Media Co.*, 445 N.W.2d 248 (Minn. App. 1989), correctly sets forth the applicable contract law governing the transaction between Cohen and employees and agents of these media defendants.

Therefore, I adopt it as my dissent here. I likewise join the dissent of Justice Yetka which highlights the perfidy of these defendants, the liability for which they now seek to escape by trying to crawl under the aegis of the First Amendment, which, in my opinion, has nothing to do with the case.[1] Today's decision serves to inhibit rather than to promote the objectives of the First Amendment by "drying up" potential sources of information on public matters. I dissent.

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[1]These media defendants now advance a First Amendment argument based upon the "public's right to know." I suggest to do so is indeed ironical when considered in the light of the extensive efforts of each to promote enactment of Minnesota Statutes Sections 595.021 to 595.025, the Minnesota Free Flow of Information Act, sometimes popularly referred to as the Reporter's Shield Act. This statute protects the news media from compelled disclosure of sources in court and other proceedings. Ralph Bailey, editor of the Minneapolis Tribune, urged passage of a similar companion bill before the Judicial Administration Subcommittee of the Senate Judiciary Committee on March 30, 1973, as did an attorney-lobbyist for the St. Paul and Duluth newspapers. That same attorney-lobbyist and John Finnegan, Executive Editor, St. Paul Dispatch, appeared and testified at a meeting of the Judiciary Committee of the House of Representatives on March 1, 1973, and again later on March 14, 1973. Both participated in discussion of amendments to the proposed bill (House File 624), which ultimately was passed and is now codified as Minnesota Statutes Sections 595.021 - 595.025. Although minimal amendments to these statutes were made in 1981, 1983, and 1986, they did not change the basic substance of the statute. Thus, the Minnesota Free Flow of Information Act, when combined with today's decision, with few tightly circumscribed exceptions, leaves the "public's right to know and protection of confidential sources," not with the peoples' representatives — the legislature and the courts — but rather with the executives of the commercial media.

STATE OF MINNESOTA
IN COURT OF APPEALS

C8-88-2631
C0-88-2672

Hennepin County — Short, Judge
Concurring in part, dissenting in part, Crippen, Judge

Dan Cohen,

Respondent (C8-88-2631),
Respondent (C088-2672),

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3901 West 25th Street
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Filed: September 5, 1989
Office of Appellate Courts

SYLLABUS

The first amendment does not bar a contract action by a confidential source against newspapers for publication of the source's name. While the breach of contract claim is supported by the record, the source's claims of misrepresentation and punitive damages are not appropriate because the newspapers' promises of confidentiality contained no material misrepresentations or omissions.

Affirmed in part and reversed in part.

Heard, considered and decided by Short, Presiding Judge, Crippen, Judge, and Schultz, Judge.*

OPINION

SHORT, Judge

Cowles Media Company, d/b/a Minneapolis Star and Tribune (Tribune) and Northwest Publications, Inc. (Dispatch), appeal the trial court's judgment awarding Cohen $200,000 in compensatory damages and $500,000 in punitive damages. This action arises out of the newspapers' publication of Cohen's name after reporters employed by the newspapers had promised Cohen that his name would not be published. The trial court concluded that the first amendment did not bar Cohen's breach of contract and misrepresentation claims and submitted those claims to the jury. The jury returned a verdict in favor of Cohen. The trial court denied the newspapers' alternative motions for judgment notwithstanding the verdict and a new trial. On appeal, the newspapers argue that the trial court erred in (1) ignoring the protection afforded the press by the first amendment, (2) instructing the jury with respect to Cohen's contract claim, (3) submitting the issue of fraud to the jury, (4) submitting the issue of punitive damages to the jury, and (5) admitting irrelevant and prejudicial evidence regarding other Tribune publications. We affirm the judgment on the breach of contract claim, but reverse as to the claims for misrepresentation and punitive damages.

FACTS

In the fall of 1983, respondent Dan Cohen was the director of public relations for an advertising agency. That

*Acting as judge of the Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 2.

agency was handling the advertising for the campaign of Wheelock Whitney, the Independent Republican (IR) gubernatorial candidate. Cohen was a long-time and well-known IR supporter. One week before the gubernatorial elections, Gary Flakne, a former IR legislator and county attorney, unearthed documents which demonstrated that the Democratic-Farmer-Labor (DFL) candidate for lieutenant governor Marlene Johnson, had been arrested in 1969 for unlawful assembly (that charge was later dropped) and arrested and convicted of petty theft in 1970 (that conviction was vacated in 1971). Flakne scheduled a meeting with several IR supporters for October 27 to discuss release of these documents to the media. Cohen attended this meeting.

At the meeting, the group decided that Cohen should be the person to release the documents because he had the best rapport with the local media. The group further discussed and agreed that Cohen should retain anonymity in releasing the information. Cohen immediately contacted four journalists: Lori Sturdevant of the Tribune; Bill Salisbury of the Dispatch; Gerry Nelson of the Associated Press; and David Nimmer of WCCO Television. He reached all but Nimmer by telephone and said:

> I have some material which may or may not relate to the upcoming statewide election. And assuming that we can reach an agreement as to the basis on which I would provide this material to you. I will provide it.

All three reporters agreed to meet with him.

Later that morning, Cohen met separately with Sturdevant and Salisbury in the State Capitol building news office. He made the following proposal to each reporter.

> I have some documents which may or may not relate to a candidate in the upcoming election, and if you will give me a promise of confidentiality, that is that I will be treated as an anonymous source, that my name will not appear in any material in connection with this, and that you will also agree that you're not going to pursue with me a question of who my source is, then I will furnish you with the documents.

Sturdevant promptly and unequivocally agreed to Cohen's proposal. Cohen then gave her copies of the documents, and she allegedly said, "This is the sort of thing that I'd like to have you bring by again if you ever have anything like it." Sturdevant then asked Cohen if she had this information on an exclusive basis. Cohen said "No." Sturdevant did not protest or express any dissatisfaction with this non-exclusive arrangement.

Salisbury also agreed immediately to Cohen's proposal regarding anonymity. After reviewing the papers Cohen had given him, Salisbury described them as "political dynamite." The issue of exclusivity was never discussed between Cohen and Salisbury.

Cohen then met separately with Nelson and Nimmer. The same proposal was made to each reporter and was accepted by each. After securing the promise of confidentiality, Cohen delivered the documents.

Thereafter, Cohen returned to work and informed his supervisor that he had supplied the documents to the media. Cohen testified that his supervisor had no reaction as to his disclosure. The supervisor, however, testified at trial that he was upset by what he believed were Cohen's unscrupulous practices.

Sturdevant immediately reported the information she had received from Cohen to her supervisor. The Tribune editors

assigned four or five reporters to follow up on the story and to contact members of the two gubernatorial campaigns. A reporter, who was directed to verify the authenticity of the court records, discovered Gary Flakne's name on the list of persons having recently reviewed the records. The reporter contacted Flakne and asked Flakne for whom he had obtained those documents. Flakne told the reporter that he had obtained the documents for Cohen.

The Tribune editor who had the ultimate say in whether to run the story convened a "huddle" sometime around 3:00 p.m. to discuss the handling of the information. That group decided that if the Tribune did not run the story, the paper could be accused of suppressing information damaging to the DFL party. They also discussed simply publishing the information on the arrest and conviction and honoring the promise to Cohen. The group considered it unsatisfactory to describe the source as a Whitney supporter, a Whitney campaign member, or a prominent Independant Republican. The Tribune had never before dishonored a reporter-source agreement.

Sturdevant, who was not a part of the "huddle" and had no other input into whether the story was reported, was asked by her editors to see whether Cohen would release the Tribune from its promise of anonymity. Sturdevant expressed her adamant objection to dishonoring the promise to Cohen and she demanded that her name not appear on the article should it be published. She nevertheless agreed to write the article and to ask Cohen to release the Tribune from its promise. She telephoned Cohen two or three times, but each time Cohen refused to agree to have his name published. Finally, the Tribune decided to run the story disclosing Cohen's identity. Sturdevant then contacted

Cohen to inform him of the situation and he said if his name was to be published, he wanted to make the following statement:

> The voters of this state are entitled to know that kind of information. Every day Perpich and Johnson failed to reveal it to them, they were living a lie.

On October 28, 1982, the Tribune ran an article appearing on the bottom half of the front page, entitled "Marlene Johnson Arrests Disclosed by Whitney Ally." Pursuant to Sturdevant's demand, the article was attributed to "Staff Writer." The article disclosed Johnson's arrests and conviction, and named Cohen as the source of the information. The article also revealed that Cohen was employed by the agency handling the advertising for the IR gubernatorial campaign. The article did not mention Sturdevant's promise of anonymity to Cohen.

In contrast to the manner in which the Tribune handled the matter, the Dispatch editors did not engage in involved deliberations before deciding to disclose Cohen's identity. Salisbury also objected to dishonoring his promise to Cohen. However, he did not object to his name appearing on the article. The Dispatch ran an article similar to the Tribune's in both Dispatch editions on October 28. The articles appeared in the local news sections, disclosed the convictions and arrests, and identified Cohen as the source. This occasion was the first time that the Dispatch had dishonored a reporter's promise to keep a source confidential. While the articles stated that Cohen asked that his name not be used, they failed to disclose that a Dispatch reporter had promised to keep Cohen's name confidential. Unlike the Tribune article, however, the Dispatch articles did not mention the name of Cohen's employer.

The Associated Press honored its reporter's promise to Cohen by stating that court documents relating to the arrests and conviction "were slipped to reporters." WCCO-TV also honored its reporter's promise by deciding not to broadcast the story at all.

Later in the day on October 28, after learning that Cohen's name and employment had been published in connection with the story, Cohen's employer confronted him and a heated discussion ensued. According to Cohen, that discussion ended with his being fired. According to Cohen's employer, Cohen resigned. The newspapers do not now dispute that Cohen was fired or otherwise forced to resign as a result of the story.

On October 29, the Tribune published a column criticizing Cohen for his self-righteousness and unfair campaign tactics. On October 30, the Tribune ran an editorial cartoon depicting a trick-or-treater outfitted as a garbage can knocking on the door of the DFL headquarters. The garbage can was labeled "Last minute campaign smears," and governor Rudy Perpich was opening the door, stating, "It's Dan Cohen."

Sometime during the week beginning October 31, Flakne wrote to the editor of the Dispatch criticizing both newspapers for their breach of the reporter-source agreement with Cohen. On November 7, four days after the election, the Dispatch printed Flakne's letter on its editorial page. That same day, the Tribune ran a more edited version of Flakne's letter along with an article explaining why the newspaper had overridden its reporter's promise to Cohen.

Cohen subsequently commenced this breach of contract and misrepresentation action, seeking both compensatory and punitive damages. The jury found that both newspapers

had entered into binding contracts with Cohen and that they breached those contracts. The jury further found that both newspapers made material misrepresentations of fact to Cohen. The jury awarded Cohen $200,000 in compensatory damages and $500,000 in punitive damages.

The newspapers alternatively moved for judgment notwithstanding the verdict or a new trial, alleging numerous trial court errors. The trial court denied these motions and entered judgment. The Tribune and the Dispatch separately appealed the judgment, and we consolidated the appeals.

ISSUES

I. Did the trial court err in concluding that the first amendment does not bar an action for breach of contract against the newspapers for their disclosure of Cohen's name, even though such disclosure was truthful and newsworthy?

II. Did the trial court err in instructing the jury with respect to Cohen's contract claim?

III. Did the trial court err in denying the newspapers' motions for judgment notwithstanding the verdict on the misrepresentation claim?

IV. Did the trial court err in submitting the issue of punitive damages to the jury?

V. Did the trial court commit reversible error in admitting other Tribune publications into evidence?

ANALYSIS

I.

The trial court correctly concluded that the first amendment does not bar Cohen's contract claim. There is no state action, the alleged first amendment rights do not outweigh the governmental interests, and the newspapers knowingly waived their first amendment rights.

A. *State Action*

We believe that there is no state action present in this case to trigger first amendment scrutiny. The first amendment prohibits the government from making laws "abridging the freedom of speech, or of the press." U.S. Const. amend. I. The first amendment bars only government action that restricts free speech or press freedom. *Public Utilities Commission of District of Columbia v. Pollak*, 343 U.S. 451, 461 (1952).

The United States Supreme Court has repeatedly held in a variety of contexts that the neutral application of state laws is not state action. *See Tulsa Professional Collection Services, Inc. v. Pope*, — U.S. —, —, 108 S. Ct. 1340, 1345 (1988) (private use of state sanctioned private remedies or procedures does not rise to level of state action); *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 163 (1978) (action pursuant to state law is not state action); *Evans v. Abney*, 396 U.S. 435, 446 (1970) (operation of neutral and nondiscriminatory state trust laws does not constitute state action). The decisions of other federal courts are in accord. *See Peters v. United States*, 694 F.2d 687, 697 (Fed. Cir. 1982) (modification of contract to which government is a party is not state action); *Warren v. Government*

National Mortgage Association, 611 F.2d 1229, 1234 (8th Cir. 1980) (extrajudicial foreclosure pursuant to power of sale terms of the deed of trust performed in accordance with state law is not state action), *cert. denied*, 449 U.S. 847 (1980); *Doe v. Keane*, 658 F. Supp. 216, 220-21 (W.D. Mich. 1987) (exercise of a choice allowed by state law, where initiative comes from private actor and not from state, cannot make private act a state act); *Price v. International Union, United Automobile Aerospace & Agricultural Implement Workers of America*, 621 F. Supp. 1243, 1250 (D. Conn. 1985) (court intervention is possible in any suit on a contract and does not in itself constitute state action merely because free speech may be curtailed); *International Society for Krishna Consciousness, Inc. v. Reber*, 454 F. Supp. 1385, 1388-89 (C.D. Cal. 1978) (use of state trespass laws to enforce private property rights is not state action). Only when private parties make use of state procedures with the overt, significant assistance of state officials, has the United States Supreme Court found state action to be present. *See Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982).

We do not doubt that court action can constitute state action in some circumstances. In *Shelley v. Kraemer*, 334 U.S. 1 (1948), the Supreme Court held state enforcement of a racially restrictive covenant was state action prohibited by the fourteenth amendment. In that case, third parties, aided by the courts, were preventing the sale of real property by enforcing racially restrictive covenants. *Id.* at 18. Under these circumstances, the state courts' conduct was "active intervention." *Id.* at 19. By actively perpetuating the denial of black people's property rights, the courts were defeating the basic objective of the fourteenth amendment.

Although the language of *Shelley* is expansive, we believe it does not stand for the proposition that application of neutral common law rules is always state action. The Supreme Court held in *Evans*, for example, that "the operation of neutral and nondiscriminatory state trust laws" did not constitute state action for purposes of the fourteenth amendment. 396 U.S. at 446. In *Evans*, the alleged state action was the application of neutral rules of construction designed to determine the intent of the testator. The Court held that such action does not violate the fourteenth amendment. *Id.*

Thus, the issue this court faces is whether the application of neutral principles of contract law to a promise not to publish the source of information is state action which triggers first amendment scrutiny. We believe the rule in *Evans* more closely fits our situation, and therefore hold no state action is present. The court here was not engaging in "active intervention" at the request of third parties, as was the case in *Shelley*. Rather, the parties themselves made the agreement without involvement by the state. The enforcement of the contract is not impermissible state involvement in the denial of a constitutional right. Rather, the state is enforcing an agreement between private parties who have bargained for the content of published information. In these circumstances, the parties' agreement, even with ultimate state enforcement, is not deserving of first amendment scrutiny.

The Supreme Court held in *New York Times v. Sullivan*, 376 U.S. 254 (1964), that application of state defamation law to a newspaper was state action. *Id.* at 265. We believe the rule in *New York Times* has little relevance to an action brought under contract law. Defamation law inherently

limits the content of speech. Speech which meets the elements of the defamation tort and the malice requirements of *New York Times* may be sanctioned by damage awards enforced by the courts. Contract law is, we believe, fundamentally different. The rules of contract law do not sanction any particular speech. The parties themselves chose the speech or conduct they wished to be the subject matter of the contract. An award of contract damages, therefore, does not sanction the words or conduct themselves, but rather the failure to honor a promise. Because the action of the court is not suppression of speech, it is not state action of the type at issue in *New York Times*. Thus, we conclude that the application of neutral contract principles to a private party's agreement to suppress speech is not state action, and does not require first amendment scrutiny.

B. *Weighing of Competing Interests*

Assuming that this civil contract suit may nonetheless constitute state action, the first amendment still did not relieve the newspapers of the obligation they had to honor the terms of their contract with Cohen. The United States Supreme Court has adopted a balancing test to determine whether official action which has adverse or chilling effects on speech violates the first amendment. *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 582 (1983); *Branzburg v. Hayes*, 408 U.S. 665, 680-81 (1972). A burden on first amendment rights is justified only if necessary to achieve an overriding governmental interest. *Minneapolis Star & Tribune Co.*, 460 U.S. at 582.

The Supreme Court has found a variety of permissible burdens on the press. For example, the first amendment does

not invalidate the application of civil or criminal laws to members of the press despite the burden on press freedom which their application may impose. *Branzburg*, 408 U.S. at 682-83. Newspapers have no special immunity from the application of general laws, nor do they have a special privilege to invade the rights and liberties of others. *Id.*; *Associated Press v. NLRB*, 301 U.S. 103, 132 (1937); *Galella v. Onassis*, 487 F.2d 986, 995 (2nd Cir. 1973). News organizations are not exempt from federal labor laws, *see Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 192-93 (1946), or from nondiscriminatory forms of general taxation. *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936). State and federal governments can subject newspapers to generally applicable economic regulations without violating the first amendment. *Minneapolis Star & Tribune Co.*, 460 U.S. at 581.

The press also is not free to publish with impunity everything it desires to publish, nor does it have a constitutional guarantee of access to information not available to the public generally. *Branzburg*, 408 U.S. at 683-84. Consequently, the first amendment permits the media's access to grand jury proceedings, judicial conferences, meetings of other official bodies in executive sessions, disaster scenes, or criminal trials to be restricted in some circumstances. *Id.* at 684-85. *See also Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 609 (1978) (first amendment generally grants press no greater right to information about trial than that of the general public).

It is apparent from these and other federal cases that news organizations cannot rely on the first amendment to shield themselves from criminal or civil liability simply because the acts giving rise to such liability were taken while

in pursuit of newsworthy information. It is even more apparent that news organizations are not exempt from liability when they breach contracts entered into for the very purpose of gathering the news.

The governmental interest in allowing the civil damage award in the instant case outweighs the intrusion on press freedom. The government has an interest in protecting the expectations of a person who freely enters into a contract in reliance on the court's power to remedy any damage he or she might suffer should the other party fail to perform.

The protection of contractual rights has been found to be a compelling state interest in another context. *See Duluth Lumber & Plywood Co. v. Delta Development, Inc.*, 281 N.W.2d 377, 381-83 (Minn. 1979) (holding state has compelling interest in applying its contract law to a civil dispute involving the Chippewa Tribe). The United States Supreme Court has implicitly found the protection of contractual rights to be a sufficient governmental interest to outweigh first amendment rights. *Snepp v. United States*, 444 U.S. 507 (1980) (per curiam) (where both majority and dissenting opinions agreed contractual remedies were appropriate to enforce a contract to suppress speech).

We find no reason to provide less protection to the reasonable expectations of a newspaper informant than we would to any other party to whom the newspaper makes a promise. Surely, the newspapers would not suggest they are immune to ordinary commercial contracts for goods and services. Yet the newspapers maintain that an agreement with a news source is exempt from the law of contracts. We disagree. The agreement to provide information, like any other service, is an appropriate subject matter for the law of contracts.

Balanced against the clear interest of the state to impartially protect the sanctity of contracts is the alleged burden contract law places upon the press. The newspapers argue the newsworthiness of Cohen's name is enough to outweigh the state's interest in enforcing the contract. We disagree. The newspapers had an interest in providing information relating to the credibility and motivations of the source, but not necessarily in providing Cohen's name. Reporting that the source was aligned with the IR party in some manner would have satisfied the need to describe the source.

The newspapers argue that the government has no interest in allowing a civil damage award because the contract itself is invalid. The newspapers claim that only the journalist, and not the source, has a right to enforce a confidentiality agreement. The newspapers have failed to cite any case law which suggests that a source has no right to enforce a confidentiality agreement. In fact, leading authority implies that the source's wish to remain confidential is an important factor to consider in determining whether to compel release of information. Indeed, the only case we have found which discusses breach of contract suggests that a source may bring an action against a publisher for breaking a promise of confidentiality. *See Huskey v. National Broadcasting Co.*, 632 F. Supp. 1282, 1292 n.15 (N.D. Ill. 1986).

The newspapers also argue that the governmental interest in allowing a civil damages suit is minimal because reporters' promises are ethical, not legal obligations, and court intervention in such cases is inappropriate. We disagree. The specter of a large damage award is a much more effective incentive for a publisher to honor a promise of confidentiality than the fear of criticism from other members

of the press. Indeed, any such fear of professional criticism in this case was apparently insufficient to convince appellants to abide by their promises.

We are not convinced that the public's access to information is restricted by our decision to allow a contract damage award in this case. Were we not to enforce the newspapers' promises of confidentiality, confidential sources would have no legal recourse against unscrupulous reporters or editors. Ultimately, news sources could dry up, resulting in less newsworthy information to publish. Our decision enhances the legislatively expressed interest in protecting confidential news sources in order to promote the free flow of information to the media and, ultimately, to the public. *See* Minn. Stat. § 595.022 (1988).

Our decision also does not intrude into the editorial process itself, and does not limit the right to publish information lawfully obtained without a promise of confidentiality. *Cf. Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (suggesting government cannot regulate editorial processes). In this case, the newspapers, through their reporters, voluntarily agreed not to publish Cohen's name in return for other publishable information. Damages were awarded not merely because the newspapers published Cohen's name but because by doing so, they violated their contracts with him. We do not think it an undue burden to require the press to keep its promises.

C. *Waiver*

A constitutional right cannot be waived except in clear and compelling circumstances. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 145 (1967). First amendment rights may be waived "where the facts and circumstances surround-

ing the waiver make it clear that the party foregoing its rights has done so of its own volition, with full understanding of the consequences of its waiver." *Erie Telecommunications, Inc. v. City of Erie, Pennsylvania,* 853 F.2d 1084, 1096 (3rd Cir. 1988). Under the circumstances in this case, we conclude that the newspapers effectively waived any first amendment rights they may have had to publish Cohen's name as the source of the documents relating to Johnson. The two people pledging confidentiality in the instant case were both seasoned reporters who had given such pledges on a regular basis for many years prior to this incident. They also knew Cohen's status as an active and prominent Independent Republican, and thus knew that his name could be of public interest. Therefore, they understood that they were waiving the right to publish a potentially newsworthy item in return for obtaining another potentially newsworthy item from Cohen.

The newspapers also argue that the waivers were not knowing and voluntary because the reporters did not know the information they were about to receive would be such as to make Cohen seem petty and unscrupulous for having released it. Some form of this argument, however, could be used in every confidential source situation because the reporter never knows exactly what information he or she will get when the promise is made. Furthermore, in this case, the reporters must have anticipated Cohen was to give them damaging information about a DFL candidate because he said that the information might relate to a political candidate. The reporters' waivers are not any less knowing or voluntary merely because they did not know exactly what information they would receive.

It is significant that the waiver in this case was not ex-

tracted by the state. Rather, the waiver was part of a negotiated agreement between experienced reporters and an experienced political operative. Under these circumstances, the newspapers' waivers do not deserve as much protection as would a criminal defendant pleading guilty to a crime or waiving trial by jury. It also is significant that the alleged state action here was not intended to suppress a viewpoint. It was merely a content-neutral enforcement of an agreement between private parties of equal bargaining power.

II.

The Dispatch argues the trial court erred in failing to instruct the jury that there can be no contract where one party does not disclose all material facts which he knows the other party does not know and which the other party would need to know to make an informed decision under the circumstances. A party is entitled to a jury instruction only when the party presents evidence supporting its theory of recovery. *Lhotkan v. Larson,* 307 Minn. 121, 125 n.7, 238 N.W.2d 870, 874 n.7 (1976). Here, Salisbury stated that Cohen did not deceive or mislead him in any way. He also stated he was well aware that Cohen was active in the IR party and was a Whitney supporter. Finally, Salisbury did not even consider whether the information was to be exclusive, and he did not ask Cohen about it. Given the lack of evidence of any fraudulent inducement, the trial court properly refused to submit the proposed jury instructions.

The Tribune argues that the information provided by Cohen was so insignificant that it fails as consideration when compared with the much more valuable promise of confidentiality. As Cohen's expert journalist witness testified,

however, such deals are common in the industry and there is no way journalists can know exactly how valuable information will be before the return promise of confidentiality is given. Furthermore, both Salisbury and Sturdevant felt that the information about Johnson was in fact important, thus undercutting any failure of consideration argument. The documents Cohen supplied were sufficient consideration.

The Tribune also claims the contract is unenforceable because the subject matter of the contract is the deceptive manipulation of the electoral process. The newspapers rely on 17 C.J.S. *Contracts* § 218 (1963), which states: "Contracts which impair or tend to impair the integrity of public elections are against public policy." This provision, however, contemplates contracts such as those where payment is contingent upon the use of influence to secure another's election or where the candidate is a party to the contract. Because Cohen made no payment to the newspapers and exacted no promise that the newspapers would use their influence or otherwise attempt to secure Whitney's election, the contract did not involve wrongful manipulation of the electoral process.

Finally, the newspapers argue that a promise of confidentiality is not enforceable because it is part of an "agreement that by its terms is not to be performed within one year from the making thereof." *See* Minn. Stat. § 513.01(1) (1988). The statute of frauds does not apply, however, where one party can and does fully perform within the year. *Langan v. Iverson*, 78 Minn. 299, 302, 80 N.W. 1051, 1052 (1899). The statute is thus inapplicable because Cohen fully performed his obligations upon delivery of the documents.

III.

The newspapers argue that the trial court erred in failing to grant judgment notwithstanding the verdict on the misrepresentation claim. The standard to be applied in determining the propriety of granting a motion for a judgment notwithstanding the verdict is whether there is any competent evidence reasonably tending to support the verdict. *Bisher v. Homart Development Co.*, 328 N.W.2d 731, 733 (Minn. 1983) (quoting *Seidl v. Trollhaugen, Inc.*, 305 Minn. 506, 507, 232 N.W.2d 236, 239 (1975)). The trial court must accept the view of the evidence most favorable to the verdict and admit every inference reasonably to be drawn from that evidence. *Id.* When the facts are undisputed and reasonable minds can draw but one conclusion, the question becomes one of law for the court. *Kramer v. Kramer*, 282 Minn. 58, 65, 162 N.W.2d 708, 713 (1968). We find in the instant case that there was no misrepresentation as a matter of law, and the trial court erred in failing to grant the newspapers' motion for judgment notwithstanding the verdict on the misrepresentation claim.

To be actionable, a misrepresentation must misrepresent a present or past fact. *Dollar Travel Agency, Inc. v. Northwest Airlines, Inc.*, 354 N.W.2d 880, 883 (Minn. Ct. App. 1984). Simply because a party in the future fails to perform does not mean that there was any misrepresentation at the time the contract was made. *Id.* However, if the party, when entering into the contract, never had any intent to perform the contract, then the act of entering into a contract with no intent to perform constitutes a misrepresentation. *Wood v. Schlagel*, 375 N.W.2d 561, 564 (Minn. Ct. App. 1985).

Cohen concedes the reporters themselves intended to perform the contracts and that they did not commit misrepresentations. He claims, however, that the editors never intended to perform the contracts and that the intent not to perform should thus be deemed to have been present at the inception of the contracts, when the reporters made the promises. Cohen relies on *Guy T. Bisbee Co. v. Granite City Investing Corp.*, 159 Minn. 238, 244, 199 N.W. 14, 16 (1924), for the proposition that an intent not to perform at the inception of a contract can be inferred where the period of time between the making of the promise and its repudiation is short, and there is no change in circumstances. Cohen's reliance on *Bisbee* is misplaced.

In *Bisbee*, there was other circumstantial evidence to suggest that the tortfeasor did not intend to keep the promise at the time the promise was made. Thus, the court was faced with an evidentiary problem in that, although the party may have indeed intended not to perform, there was no direct evidence of this intent. Recognizing that direct evidence of intent is often unavailable, the court held that under the circumstances outlined in that case, an intent not to perform could be inferred from the fact that the breach took place soon after the contracts were formed. *Id.* at 243-44, 199 N.W. at 16. In this case, however, because there is direct evidence of both the reporters' and editors' intentions, resort to inferences is unnecessary and inappropriate.

Cohen alternatively relies on *Swanson v. Domning*, 251 Minn. 110, 117, 86 N.W.2d 716, 721 (1957), which held that where a principal becomes aware that an agent has made untrue representations of fact, regardless of whether the agent himself knew the representations were untrue, the principal may not retain the benefits of that transaction

and at the same time escape liability for the untrue representations by which the benefits were obtained. *Swanson* does not apply here, however, because the agents themselves made no misrepresentations, either innocently or knowingly.

Cohen also argues that his misrepresentation claim is based on the reporters' concealment of the fact that they had no authority to bind the newspapers. We find no evidence to support this theory. An omission of a material fact may give rise to a cause of action for misrepresentation if one party has special access to the facts and the other does not, or if omitting the fact is misleading. *Sit v. T & M Properties*, 408 N.W.2d 182, 186 (Minn. Ct. App. 1987). In this case, however, there was no evidence the reporters who promised confidentiality had special access to the newspapers' written policy regarding confidentiality. The evidence showed they were unaware of it. Further, there was no evidence that the omission of fact was misleading. The actual practice of the newspapers was to abide by their reporters' promises of confidentiality. In fact, no witness could recall a prior instance when the promise of a reporter was vetoed by an editor. Seasoned reporters believed they had authority to bind the newspapers. Based on past practice, we believe they did have such authority. Because it was the newspapers' practice to honor their reporters' promises of confidentiality, the reporters did not by omission misrepresent their authority.

Under these circumstances, the trial court erred in failing to grant the newspapers' motion for judgment notwithstanding the verdict on the misrepresentation claim. There was no evidence of material misrepresentations or omissions. Accordingly, we reverse on this issue. Because the newspapers engaged in no independent tort, punitive damages are unavailable, *see Haagenson v. National Farmers Union*

Property & Casualty Co., 277 N.W.2d 648, 652 (Minn. 1979), and the trial court's award of punitive damages must be set aside.

IV.

Because there were no misrepresentations, Cohen may recover only compensatory damages resulting from the breaches of contracts. The nonpunitive damages were awarded to compensate Cohen for loss of his job. The newspapers claim these are consequential or special damages, i.e., damages not contemplated by the parties when entering into the contracts, and therefore are not recoverable in a breach of contract action.

Minnesota follows the rule of *Hadley v. Baxendale*, 9 Ex. 341, 156 Eng. Rep. 145 (1854), which holds that damages recoverable in contract actions are those which arise naturally from the breach or those which can be supposed to have been contemplated by the parties when the contract was formed. *Lesmeister v. Dilly*, 330 N.W.2d 95, 103 (Minn. 1983). Whether damages naturally arose from the breach (reasonably foreseeable as a probable consequence) or were contemplated by the parties is a question of fact which depends upon the nature of the contract and the circumstances surrounding its execution. *Franklin Manufacturing Co. v. Union Pacific Railroad Co.*, 311 Minn. 296, 298-99, 248 N.W.2d 324, 326 (1976).

When asked why he wanted anonymity, Cohen testified:

> I feared retribution, I feared retaliation that could be damaging to me personally, that could damage my wife and daughters, that could damage the campaign, by a powerful media, by powerful politicians, for revealing the truth.

He also stated:

> I think that were my identity revealed because I was the messenger of ill tidings that the public, my employer, the press, the world at large, would heap opprobrium on my head.

Even if Cohen himself did not fear specifically for the loss of his job, a Dispatch editor and an expert journalist witness both testified that confidential sources often seek confidentiality exactly because they are afraid they might lose their jobs. The expert witness testified that editors are or should be well aware of the reasonable consequences, including loss of employment, which could occur if the confidences are revealed. The evidence was sufficient to support the finding that the loss of Cohen's employment was reasonably foreseeable. Cohen's job loss therefore is in the nature of general, as opposed to consequential, damages and is recoverable in contract.

V.

The Tribune argues that the trial court erred in admitting a number of Tribune newspaper articles. The trial court has discretion in its determinations as to the relevance and prejudicial effect of evidence. *State v. Lee*, 282 N.W.2d 896, 901 (Minn. 1979). The admission of inadmissible evidence requires a new trial only if the error is prejudicial *See Fewell v. Tappan*, 223 Minn. 483, 497, 27 N.W.2d 648, 656, (1947).

The challenged newspaper articles fall roughly into three categories. First, a number of the articles were written with the use of confidential sources, whose identities were newsworthy according to Tribune witnesses. Despite the

newsworthiness of these sources' identities, the Tribune never revealed their identities. Second, some articles used confidential sources despite the fact that the Tribune did not have an "exclusive" on the information from the sources. This evidence was offered to rebut the claim that Cohen's identity was revealed because he failed to give the Tribune an "exclusive." Finally, Cohen offered the garbage can editorial cartoon and two column articles to show that the Tribune was acting with willful indifference to his rights, and was continuing to disparage him while failing to disclose its own breach of promise. This evidence of the Tribune's failure to act evenhandedly was offered to rebut claims that the Tribune had to publish Cohen's identity to give its readers a fair picture.

We conclude that the trial court was well within its discretion in determining that the offered newspaper articles were relevant and more probative than prejudicial. *See* Minn. R. Evid. 403. The Tribune has failed to show that the trial court clearly abused its discretion in admitting the articles.

The Tribune also argues that the closing argument for Cohen was so inflammatory that a new trial is required. We disagree. A major focus of the newspapers' trial strategy was to portray Cohen as a scurrilous and dishonest politicker. In light of these attacks on Cohen's character, comments on the newspapers' ignoble motivations are not unduly prejudicial. The trial court gave a lengthy curative instruction designed to neutralize the strong arguments made by counsel on all sides. Further, the closing argument at issue was based on admissible evidence or reasonable inferences drawn from the evidence. Under these circumstances, the trial court's refusal to order a new trial based on inflammatory arguments was not an abuse of discretion. *See Connolly v. Nicollet Hotel*, 258 Minn. 405, 420, 104 N.W.2d 721, 732 (1960).

DECISION

The trial court's judgment determining that the newspapers are jointly and severally liable for $200,000 in compensatory damages as a result of their breaches of contract is affirmed. The trial court erred, however, in failing to set aside the misrepresentation claim because there was no evidence that the newspapers made material misrepresentations or omissions. Because the newspapers engaged in no independent tort, the trial court's judgment awarding punitive damages to Cohen is reversed.

Affirmed in part and reversed in part.

8-29-89 /s/ MARIANNE D. SHORT

CRIPPEN, Judge, concurring in part, dissenting in part

I agree appellants are entitled to relief from a judgment premised on a tort allegation. Because we are compelled to respect vital standards on freedom of the press, the judgment on respondent's contract claim is fundamentally flawed and also should be reversed. *See* U.S. Const. amend. I (enunciating the freedom of speech, and expressly prohibiting laws abridging the freedom of the press); Minn. Const. art. 1, § 3 (likewise adding to the guarantee for free speech a declaration that "the liberty of the press shall forever remain inviolate").

Support for the contract claim is premised on two categories of argument, and both misshape the law of the case.

First, it is said that conflict with the first amendment here is unsubstantial or even nonexistent. To the contrary, what has happened here involves the exercise of the coercive power of the state to punish the choice of the private press to publish. Making the problem still more critical, this sanction occurs for printing a true story on the purely political behavior of a public figure, and on the effort of respondent to cover the occurrence of that conduct.

Second, addressing the sacrifice of press freedom, it is asserted that this is justified by predominant considerations. This claim is premised on the notion that verbal assurances of a press reporter are uniquely important, either for the sake of respondent or as a measure of improvidence of the press justifying the loss of its freedoms. Here again, the arguments are untenable; they conflict with important decisions delimiting the state interest in common law claims, and stringent restrictions on the notion of any waiver of freedom of the press.

The consequence of these mistaken propositions of law is a decision for sanctions which is out of sync with settled first amendment principles. No authority, direct or by remote analogy, permits an award of damages for publishing political material, and justifies this as an application of state common law not even slightly limited in deference to the first amendment. Nor does any authority, direct or by analogy, permit sanctions for publishing political information and justify this on the premise that the press waived the right to publish, much less on the premise such a waiver occurs upon assurances not to publish solicited informally from media reporters.

More particularly, there are six fundamental misconceptions in the rationale for the contract claim. Four are in the effort to deny that this encroachment on the first amendment is significant. The fifth is the unwarranted enlargement of a state interest in the common law of contracts. The sixth is the wrongful disregard for limits on the notion of a press freedom waiver. In each instance, propositions favoring the damage award are made without precedential authority or by reference to cases that do not adequately support the contention.

1. *First amendment implicated.*

Initially, it is argued that there has been no restriction of press freedom in this case, nothing more than "neutral enforcement" of contract law. The trial court concluded that respondent's contract claim was one with "no constitutional dimension." This proposition depends on disregard for essential facts of the case, and it relies on authorities having no bearing on the kinds of restrictions occurring here.

We are not dealing with a regular contract claim. Rather, respondent asks the courts to enforce an agreement not to publish — a pledge not to exercise press freedom. In different words, respondent seeks a judicial decree that the choice to publish information is unlawful and subject to the sanction of a money judgment. Neither the promise nor the claim are neutral to the first amendment. Rather, both inescapably implicate freedom of the press.

Authorities are cited for the proposition that civil and criminal remedies may be applied by the courts even if they place "certain conditions" upon the publication of newsworthy information. This statement of law is premised on a concept having to do with remedies which only incidentally

affect press freedom, and no authorities on the subject stand for a proposition nearly so bold as to permit the direct imposition of penalties for publishing a political news story. *See Branzburg v. Hayes,* 408 U.S. 665, 682 (1972) (enforceability of civil and criminal statutes only "incidentally burdening" the press); *Price v. International Union,* 621 F.Supp. 1243, 1246-50 (D. C. Conn. 1985) (commercial labor-management contract; trial court dicta on enforceability of union dues provision, thus enabling union political activity; decision without judicial action on the content of employee speech).

In sum, the suggestion here that the damage award is neutral to press freedom is unsound.

2. *Intrusion upon editorial process.*

To otherwise distance this case from the first amendment, it is argued that the trial court's judgment does not intrude into the editorial process, but only upon the rights and privileges surrounding promises of anonymity. This observation is essentially inaccurate, and it is not supported by any authority.

The issue on the contract claim focused singularly on the exercise of editorial judgment. Moreover, as suggested by appellant Cowles, the grievance respondent developed before the trial court was not on the choice to disclose his name but on the other contents of the resports — the breach of contract claim was thin cover for a much more intrusive indictment on editorial choices.

When the state determines through civil lawsuits what constitutes a contract, when a breach occurs, and which special circumstances permit disregard of the promise, it usurps editorial decisionmaking and chills exercise of press

freedom. In addition, this regulation inevitably shapes the decision about when the promise is appropriately used. It is for editors, not for judges, to determine whether identificatent should be made and to decide when publication is important. So, for example, in the context of this case, it is for editors, not for judges, to determine whther identification of respondent was necessary for an accurate report on the political event.

3. *However pictured, intrusion is intrusion.*

Respondent argues that regulating press freedom in the circumstances of this case does not frustrate purposes of the first amendment but enhances them — that appellants really should accept the trial court judgment, because a litte correction is for their own good. Respondent portrays a public policy for anonymity of sources, so that the press has an enlarged capacity to get disclosures of information. Thus, as respondent observes, the press has historically defended its right against disclosure of sources. *See, e.g., Landmark Communications, Inc. v. Virginia,* 435 U.S. 829 (1978); *see also* Minn. Stat. § 595.021-.025 (1988) (statutory limits on compulsory disclosure). Respondent also produced expert opinions that the violated promise of anonymity constitutes a breach of journalistic ethics.

Undoubtedly, the good judgment of the press is a matter of serious public importance. Moreover, it is certainly plausible to believe that press agencies will generally deplore compulsory disclosure of sources. Nevertheless, it must be recognized that the honor and the effectiveness of press agencies is a matter of their own prerogative, subject to the public exchange of ideas. all protected by the first amendment. *Miami Herald Publishing Co. v. Tornillo,* 418 U.S.

241, 258 (1974) (not yet demonstrated how government can regulate the exercise of editorial control and judgment "consistent with First Amendment guarantees of a free press as they have evolved to this time."). The agencies of government, including the judiciary, have neither the right nor the duty to measure or establish the wisdom and honor of the press.

4. *Freedom from sanctions for publication.*

Finally, to further the attempt to imagine a gulf between this case and the Constitution, the plea is made that at least this case does not involve prior restraint. While this distinction may be made, there is no authority whatsoever suggesting cause to minimize, even by comparison with prior restraint law, the extraordinary first amendment danger in permitting damage awards as a sanction for publication on public issues.

To the contrary, according to authoritative declarations of law, it is important that the courts vigorously scrutinize money judgments and other sanctions against the choice to publish. *See Sullivan*, 376 U.S. at 277 (inhibiting effect of damage awards); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986) ("chilling" effect of press burden to prove truth when sued for damages). In addition, as discussed below on the issue of waiver, a federal appellate court in a suit for damages has attested that it is "manifest," even where an individual has agreed not to publish, that the first amendment would not permit restrictions on publication of unclassified information on the political topic of government activity. *United States v. Snepp*, 595 F.2d 926, 930 n.2, 932 (4th Cir. 1979).

5. *Contract law versus the first amendment.*

Ultimately, the majority describes the manner in which the first amendment is implicated by the trial court judgment. The court concludes it has found an "effective incentive" for publishers. It is contended that the trail court's intrusion upon the first amendment is justified.

The argument here to justify limiting press freedom rests on the premise that Minnesota's contract law is a compelling interest such as to shape and restrict constitutional law. Thus, in harmony with the historic misapplication of various state law claims, the common law of contracts is given "talismanic immunity" from constitutional limitations. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964). There is no authority for this position, either in terms of the first amendment or otherwise.

It is said, mistakenly, that the Minnesota Supreme Court has classified the state interest in contract law as compelling. *Duluth Lumber & Plywood v. Delta Development, Inc.*, 281 N.W.2d 377, 380-83 (Minn. 1979) is cited as support for such a proposition. The most that can be said of *Delta Development* is that there are some circumstances where the state's interest in commercial contracts may supersede some competing interests. *Id.* at 380-83 (state interest in an Indian agency's agreement to buy materials from off the reservation compels disregard for competing principles on Indian rights of self-government). *Delta Development* did not deal with a constitutional right, much less with freedom of the press or any other right under the first amendment. Moreover, the case requires an examination of the circumstances of each case, which must be done here.

How is the state's interest to be evaluated correctly? As already noted, governmental action in the form of an award

of damages stifles first amendment freedoms. It has a more "inhibiting" effect than regulation with criminal sanctions. *Sullivan,* 376 U.S. at 277. This public restriction of press freedom is unlawful absent demonstration of a state interest "of the highest order." *Smith v. Daily Mail Publishing Co.,* 443 U.S. 97, 105 (1979).

Before examining the competing state interest, it is necessary to recognize the weight on the other side of the scale. Only an extraordinary state interest permits limitation of the first amendment, because the first amendment has such preeminence in our law. "The suppression or abridgment of the publicity afforded by a free press cannot be regarded otherwise than with grave concern." *Grosjean v. American Press Co.,* 297 U.S. 233, 250 (1936). The freedom of the press is nothing less than "supremely precious" in our society. *NAACP v. Button,* 371 U.S. 415, 433 (1963). The Constitution highlights press freedom from among forms of free speech; singularly, our state constitution promises that press freedom will "forever remain inviolate," untouched. Minn. Const. art. I, § 3.

In addition, it is a settled matter of law that the situation here is at the very pinnacle of concern for press freedom. The topic of respondent's conduct is a public and political matter which the Supreme Court finds "at the heart of the first amendment's protection." *First National Bank of Boston v. Bellotti,* 435 U.S. 765, 776 (1978) (citing *Thornhill v. Alabama,* 310 U.S. 88, 101 (1940)). Speech on public issues rests "on the highest rung of the hierarchy of first amendment values." *Carey v. Brown,* 447 U.S. 455, 467 (1980). To be even more particular, "it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of

campaigns for public office." *Monitor Patriot Co. v. Roy,* 401 U.S. 265, 272 (1971).

How significant is the competing state interest? There are some identifiable state concerns that supersede the freedom of the press. Thus, for example, in *Sullivan* and its progeny, the United States Supreme Court carefully enunciated the nature and extent of an overriding state interest to protect individuals from publication of false information. Only recently the Court issued another among several decisions on state interests in protecting privacy. *The Florida Star v. B.J.F.,* 57 U.S.L.W. 4816, U.S. June 21, 1989). In *Florida Star,* the court noted various other significant state interests, including its interest in fair criminal trials. *Id.,* 57 U.S.L.W. at 1417-18 n.5, 1418 n.6.

In this case, respondent did not act as a private figure but as a political operative in public places, dealing with a purely political topic. The disputed publications of appellants were certainly on "matters of public concern." *Thornhill,* 310 U.S. at 101. No privacy interest is involved; in contrast, the topic requires the most urgent respect for first amendment freedom that is appropriate for political campaign activity. *Monitor Patriot Co.,* 401 U.S. at 272.

Further, respondent's claim is not premised on the notion of a published falsehood. We are dealing with true information, and it is the truth that has hurt respondent. *See Garrison v. Louisiana,* 379 U.S. 64, 74 (1964) ("Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned.").

What then is the state interest reflected in this trial court judgment? Respondent was given assurances of anonymity and he acted on them. He may have trusted that nothing more would be said about his conduct. The bargain was

broken and respondent suffered damages. Still, respondent identifies the interest as one to uphold an "ordinary commercial arrangement." The interest is reflected in the common law of contracts. Incidentally, a great portion of this common law is given over to the notion of equitable principles that preclude mechanical application of contract doctrine.

The state's interest to enforce performance of contracts, in the circumstances of this case, is mostly common. *Cf., e.g., Delta Development,* 281 N.W.2d at 380-83 (interest predominates over certain statutory or treaty interests, and then only in limited circumstances). Even if viewed expansively, it does not rise to the prescribed highest order which permits disregard of the first amendment.

The events here are colored singularly by a political scheme to broadcast a political attack but at the same time to evade responsibility for the act. Respondent was the chosen operative for that purpose. He went into the forums of public discussion to volunteer information, and to elicit promises that his unseemly activity would be covered up. He assembled the ingredients for an editorial predicament: to publish respondent's information as an anonymous report would be petty; to bury the information he delivered would be partial; and to imprecisely attribute disclosure of the information to a candidate's campaign would be illegitimate. To accomplish his ends respondent chose not to approach the editors who would be expected to make publication decisions. He chose not to make his proposal in a deliberative setting. Instead, he approached reporters on their beat, expecting he might readily arouse in them some desire for nuggets of political news.

Whether or not this course of conduct produced an agreement according to the niceties of contract and agency law, the enforcement of the purported agreement is not a matter of state interest of the highest order. Moreover, because respondent's concealment attempt did not regard false information or private conduct, his complaint involves a state interest in civil sanctions which is unadorned by any additional cause for coercive steps against the press. We need not decide whether some agreements on the content of publication might be enforceable. In the circumstances here, the Constitution should prevail.

Some might prefer wording this rationale on contract claims in terms of the law of contracts on agreements void as against public policy. The public policy in this instance is first amendment law, and this alternative approach to the issue requires the same comparison of competing interests. Whichever approach is taken, the result is the same. The contract claim should not have been tried and a judgment on the claim should not be affirmed.

6. *First amendment not waived.*

Respondent contends that the newspapers waived constitutional freedoms by agreeing not to expose his conduct. Here, respondent puts his argument in the form addressed in *Sullivan:* whether the press has done anything to forfeit its freedom under the Constitution. *Sullivan,* 376 U.S. at 271.

The waiver argument provides a new framework to examine this first amendment issue, but is twice mistaken. First, the waiver contention is premised on a contract claim already defective for want of an adequate state interest for its protection.

Second, respondent's waiver argument exposes further obstacles to his contract case. There are stringent conditions

for waiver of first amendment press freedoms. The broad view of waiver urged by respondent and adopted by this court requires disregard for the law of the case on these conditions.

Singularly, the waiver contention here rests on the proposition that the first amendment may be waived when it is clear one has done so knowingly and voluntarily, a matter of law attributed to *Erie Telecommunications, Inc. v. City of Erie*, 853 F.2d 1084, 1096 (3rd Cir. 1988). This description of the law is incomplete, even as to the language of *Erie*. *Id.* at 1094 (no such waiver absent "clear and compelling circumstances.").

The courts scrutinize the claim of waiver with vigor more clearly evident than already observed in assessment of state interests. "[C]ourts indulge every reasonable presumption against waiver" of any fundamental constitutional right. *Aetna Insurance Co. v. Kennedy*, 301 U.S. 389, 393 (1937) (citing *Hodges v. Easton*, 106 U.S. 408, 412 (1882)). If waiver of first amendment press rights can occur at all, it will arise only in "clear and compelling" circumstances. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 145 (1967). If a waiver is identified, it "must be narrowly construed to effectuate the policies of the First Amendment." *National Polymer Products, Inc. v. Borg-Warner Corp.*, 641 F.2d 418, 424 (6th Cir. 1981).

The circumstances here do not constitute, clearly and compellingly, a case where first amendment freedom has been renounced. Respondent solicited promises of reporters to serve his personal interests, to hide political conduct that others would believe to be shabby. He neither sought nor obtained a deliberative pledge of anonymity by media editors. Finally, what respondent wanted was not discussed,

viz., an editorial decision to repudiate the fundamental responsibility to fairly and truthfully inform the public on political campaign conduct. The issue is not whether a waiver occurred under these circumstances for civil law purposes. We are not at liberty to disregard the constitutional conditions on waiver.

Given publication of true facts on an important event of a political campaign, the clear and compelling case here is for upholding press freedom. On both a regular contract approach and a waiver analysis, respondent's breach of contract claim was constitutionally defective and should not have been tried.

Further analysis reveals the waiver concept is even more restricted, and respondent's contract claim more surely defeated. To explain this proposition, it must first be observed that there is no precedent for a finding of waiver by agreement on the part of the press, and no more than mixed indications regarding waiver by agreement for any political speech. Respondent cites as authority on the issue the *per curiam* decision of the United States Supreme Court in *Snepp v. United States*, 444 U.S. 507 (1980). In *Snepp*, the court found enforceable a former CIA agent's agreement to submit material for pre-publication review. However, the holding was not based on waiver of rights or the effects of a regular agreement, but on the intelligence agent's trust relationship in having access to classified information, such that his agreement for pre-publication clearance was a trust agreement.

More importantly, *Snepp*, which reviewed a trial court damage award, stands for a very different conclusion of law. In this and other decisions on the rights of former CIA agents, dealing both with prior restraint and damage claims,

it has been recognized that because of the first amendment the agreements of agents against disclosures are "manifestly" unenforceable to the extent those agreements address nonclassified information. *See United States v. Snepp*, 595 F.2d at 930 n.2, 932 (notwithstanding Snepp's agreement to never divulge "any information concerning intelligence or CIA that has not been made public by CIA," "manifestly the first amendment would not permit the CIA to withhold consent to publication except with respect to classified information not in the public domain"); *Snepp*, 444 U.S. at 510, 511 (twice noting without correction the Fourth Circuit opinion that Snepp had a first amendment right to publish unclassified information). *United States v. Marchetti*, 466 F.2d 1309, 1313, 1317 (4th Cir. 1972) (as to unclassified information, the first amendment precludes disclosure restrictions established "contractually or otherwise;" by signing a secrecy agreement, Marchetti "did not surrender his First Amendment right of free speech.").

Why might waiver be so inapplicable in the context of the first amendment, at least as to true information on political affairs? I suggest that disfavor for such a waiver harmonizes with the interest of the people generally, discussed in the conclusion of this opinion, for the unfettered flow of public information. As observed there, freedom of the press is everyone's right, not belonging alone to the editor and publisher. How can the law attribute to the press the capacity to waive a right which is not its own?

Clearly, there is a general interest of a unique kind regarding press freedom on political facts. We need not decide whether this policy precludes waiver of the freedom in all such cases. At least in the circumstances here it should be held that there was no waiver and that there was no enforceable contract.

7. *Acquisition of information.*

Finally, respondent states an additional argument needing only brief attention. Addressing both his tort and his contract claims, respondent suggests that appellants' conduct constitutes wrongful acquisition of information. Although this argument may have bearing on a claim of tortious misconduct, I do not perceive its relevance to the contract issue. There was no wrongful act of appellants in connection with the conduct of their reporters or in the acquisition of information peddled by respondent. Respondent's grievance is with the editorial choice to publish, which invites attention to the earlier acquisition events only insofar as they bear on the flawed claims of a contract or a waiver of first amendment rights.

8. *Conclusion.*

The award of damages here directly and substantially implicates the first amendment, and the vitality of the freedom of the press predominates in the face of competing considerations on contract law and waiver of rights. A judgment for damages in this case erroneously restricts a fundamental freedom we are to hold inviolate.

Each misconception discussed here poses the same danger, a construction of constitutional law which licenses judicial action, employing the common law, to decide whether press reports are just and to exact a penalty for a publication found to be objectionable. This is fundamentally offensive to the first amendment. "Truth and understanding," said Milton to Parliament in 1644, "are not such wares as to be monopolized and traded in by tickets and statutes and standards." J. Milton, *Areopagitia*, The Portable Milton 181 (1977).

Correctly applied, the first amendment guarantees that the press has special immunity from officials willing to restrict its freedom. Neither the courts nor other agencies of government can deal with the conduct of publishing in the same way they handle other conduct with similar characteristics. Why must this be so? First, although the press often cannot claim protection afforded to the weak, it is as likely target of regulation as the weakest citizen because it is the critic of the regulator, the adversary for many designs of public figures. Properly upheld, the first amendment defeats this risk. In addition, the first amendment is not singularly for protecting press agencies, but generally "to prohibit government from limiting the stock of information from which members of the public may draw." *Bellotti*, 435 U.S. at 783. It is the high interest of the people against government regulation, not alone the interest of the speaker or publisher that is threatened by judicial proceedings on common law claims. Speech on public affairs is "more than self-expression, it is the essence of self-government." *Garrison*, 379 U.S. at 75. Even more to the point, demonstrating an interest everyone shares with the private press:

> A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves.

Grosjean, 297 U.S. at 250. In sum, the publication conduct of the press cannot be governed by the courts in the same manner as other conduct is judged. The award of damages here defies these principles and conflicts with the very essence of a special freedom of the press under the Constitution.

I join the majority on respondent's tort claim, but I respectfully dissent on the choice to affirm the portion of the judgment premised on a contract claim.

/s/ GARY L. CRIPPEN
August 29, 1989

STATE OF MINNESOTA — DISTRICT COURT
County of Hennepin — Fourth Judicial District

Dan Cohen,

Plaintiff,

vs.

Cowles Media Company, a corporation d/b/a Minneapolis Star and Tribune Company and Northwest Publications, Inc., a corporation.

Defendants.

ORDER AND MEMORANDUM
File No. 798806

The above-entitled matter came on for hearing on the 22nd day of August, 1988, before the undersigned Judge of the District Court on motion by Defendants for judgment notwithstanding the verdict, or in the alternative, a new trial.

Elliot Rothenberg, Esq., appeared for and on behalf of the Plaintiff; James Fitzmaurice, esq., appeared for and on behalf of the Defendant Cowles Media Company; Paul Hannah, Esq., appeared for and on behalf of Defendant Northwest Publications, Inc.

Upon all the files records, proceedings and arguments of counsel herein,

IT IS HEREBY ORDERED, THAT:

1. Defendant's motion for judgment notwithstanding the verdict be and hereby is denied.

2. Defendants' motion for a new trial be and hereby is denied.

3. The attached memorandum is incorporated herein by reference.

LET JUDGMENT BE ENTERED ACCORDINGLY
Dated: 18 Nov 88

/s/ FRANKLIN J. KNOLL
BY THE COURT:

MEMORANDUM

This matter came on for jury trial before this Court commencing July 5, 1988. The jury returned its verdict in favor of the Plaintiff on July 20, 1988. The Court adopted the jury's findings and filed its Findings of Fact, Conclusions of Law and Order for Judgment on August 12, 1988. Subsequently, Defendants brought this motion seeking judgment notwithstanding the verdict or, in the alternative, a new trial.

Defendants' move for judgment notwithstanding the verdict on the following grounds:

1. That the evidence, as a matter of law, failed to show the existence of a validly enforceable contract;

2. That the evidence, as a matter of law, failed to show that Defendants or either of them were guilty of fraud or misrepresentation; and

3. That the evidence, as a matter of law, does not support the Plantiff's claim for punitive damages upon the grounds urged by Defendants at the close of the Plaintiff's case in chief and again at the close of all of the evidence.

It is well-settled in Minnesota that judgment notwithstanding the verdict (judgment n. o. v.) is appropriate only where the jury's verdict is manifestly contrary to the evidence. Stated another way, a verdict should stand unless reasonable people can come to only one conclusion and that conclusion contradicts the jury's decision. *Sabasko v. Fletcher*, 359 N.W.2d 339 (Minn. App. 1984). Additionally, a motion for judgment n. o. v. admits every inference reasonably to be drawn from the evidence as well as the credibility of the testimony of the adverse party. Only where the facts are undisputed and reasonable minds can draw but one conclusion does the question become one of law for the Court. See, *Lamb v. Jordan*, 333 N.W.2d 852 (Minn. 1983); *Imdieke v. Blenda-Life, Inc.*, 363 N.W.2d 121, 123-24 (Minn. App. 1985). The Court has reviewed the parties' arguments as well as the record in this case and it is clear that the standard set by our Supreme Court has not been met. Accordingly, Defendants' motion judgment n. o. v. has been denied.

Alternatively, the Defendants seek a new trial, pursuant to Rule 59 of the Minnesota Rules of Civil Procedure, asserting three grounds in support of their motion:

1. Irregularities in the proceedings of the Court, and the orders of the Court and abuses of discretion by the Court which individually and collectively deprived Defendants of a fair trial:

2. Misconduct of Plaintiff's counsel: and

3. Errors of law.

It is well-settled in Minnesota that the primary consideration for the Court in determining whether to grant a new trial is prejudice. *Wild v. Rarig,* 302 Minn. 419, 234 N.W.2d 775 (1975). New trials should be granted only where the substantial rights of a party have been so violated that it is clear that a fair trial was not had. *See generally* 2 Herr and Haydock, *Minnesota Rules Annotated,* Section 59 (1985).

The Defendants have argued that the Court abused its discretion in receiving at trial certain evidence in the form of news articles, editorials and columns which they assert was irrelevant. In receiving this evidence, the Court found it to be indeed relevant and specifically determined that its probative value significantly outweighed any potential prejudicial impact. It is well-settled that evidentiary rulings are within the sound discretion of the trial Court. *Lines v. Ryan,* 272 N.W.2d 896 (Minn. 1978). Defendants' arguments in this regard are unpersuasive. The gratuitous conclusion accompanying Defendants' motion that this evidence "led the jury to speculate . . . and is the probable basis for the jury's award of punitive damages" demeans the intelligence of the jury. Accordingly, Defendants' motion for a new trial on this ground has been denied.

Defendants' second argument alleges that Plaintiff's counsel engaged in flagrant misconduct during the course of his final argument to the jury. Comments on admissible evidence, reasonable inferences drawn from such information, factors that affect the credibility of witnesses, and other references are appropriate in closing argument. *Connolly*

v. Nicollet Hotel, 258 Minn. 405, 104 N.W.2d 721 (1960); *Fieve v. Emmeck,* 248 Minn. 122, 78 N.W.2d 343 (1956); *Burns v. Kvernstoen,* 246 Minn. 75, 74 N.W.2d 398 (1955). The Court has reviewed the record and has concluded that prejudice of the kind contemplated by the rules is absent from this case. If anything, closing arguments by all counsel were emotionally charged, but certainly not to a level beyond the assessability of a competent jury. In addition, the Court's curative instruction at the close of the arguments clearly reemphasized the preeminence of the jury's fact-finding function as compared to the non-evidentiary nature of counsel's arguments. The Court instructed the jury as follows:

> . . . I would like to point out, Members of the Jury, and remind you, in view of the strong arguments made to you by counsel yesterday, obviously all of the parties feel very strongly about the case and that there were strong arguments presented to you yesterday. I would like you to bear in mind, however, that what is important in the case is not what counsel urges you to believe or what weight counsel urges you to give to the testimony or other evidence in this case. What matters is the amount of weight that you believe should be given to the evidence. What matters is what you believe to be true and the amount of weight which you believe should be given to the evidence. In that regard, you may, if you choose, disregard any of the comments made by counsel in their closing arguments with regard to weight to be given to evidence or what they urge on you as to what the facts are, because the facts are to be determined exclusively by you as the jury and

the weight to be given to those facts and the other evidence in the case is wholly within your domain.

A new trial is not warranted on the ground of attorney misconduct.

The Defendants have assigned error to the Court's ruling that the First Amendment of the United States Constitution is not available in this case to shield them from the consequences of breach of contract or violation of the general tort laws. Defendants' argument in this regard places far in the background the jury's findings of willful misrepresentation and the breach of a valid contract. Here, the newspapers have set up the First Amendment as a wall of immunity protecting them from any liability for their conduct while gathering news. In this regard, the United States Court of Appeals for the Second Circuit in *Gallella v. Onassis,* 487 F.2d 986 (1973) stated, "there is no such scope to the First Amendment right. Crimes and torts committed in news gathering are not protected."

The Defendants have further described the relationship between reporter and source as "sensitive" and "interpersonal", one approaching a sacred trust. Other strained metaphors invoking comparisons to family and romantic relationships are employed by the Defendants in their argument that their otherwise valid contracts should not be subject to laws governing commercial relationships. This Court is not persuaded that the relationship between reporter and source is anything other than commercial. The advertising war currently being waged by one Defendant in this case against the other is ample evidence of the profit motive underlying their operations.

Defendants next argue that by failing to immunize the reporter-source relationship from the enforcement of our

civil laws the Court subjects it to distortion and exploitation. Several hypothetical situations have been posed by the Defendants supposedly demonstrating the potential for creative Plaintiffs' attorneys to play havoc with the news gathering process. The analysis fails to recognize the voluntary nature of contractual relationships generally. More specifically, it ignores the plain fact that any restrictions reporters may place upon themselves with regard to source anonymity are undertaken voluntarily and in exchange for the valuable consideration of "getting the scoop".

Similarly, the argument that unscrupulous persons will make unfounded accusations if news organizations are held subject to the law is without merit. This Court will not accept the premise that the appropriate solution to unfounded accusations is to bar the availability of redress to citizens who have been damaged by unlawful news gathering. The newspapers' assertion that "severe criticism from fellow professionals and skepticism, loss of credibility and trust from potential or existing sources" provides sufficient deterrent against journalistic excesses rings not only unrealistic but disingenuous.

In a more substantive argument Defendants have urged that since the particular manner in which they breached their contract with the Plaintiff involved the act of publication, the First Amendment must immunize them from liability. In this regard, the Defendants rely heavily on *Cantrell v. Forest City Publishing Company,* 484 F.2d 150 (6th Cir. 1973), *reversed* 419 U.S. 245 (1974), wherein reporters visited with children at the home of the victim of a bridge collapse, taking photographs without their objections. The subsequent news story contained numerous inaccuracies and the mother of the children sued the news-

paper for invasion of privacy. The Sixth Circuit in discussing the Plaintiff's invasion of privacy claim stated:

> [T]he gravamen of this action lies in the claim that the publication of the article, not the physical intrusion, damaged the plaintiff. . . . In her testimony Mrs. Cantrell claimed no injury from the entry of the two defendants on her premises, but testified that the article made her mad and upset her because of all the untruths it contained.

484 F.2d at 154-44.

The facts in the case at bar are clearly distinguishable from those in *Cantrell,* where the Defendant reporters did nothing illegal during their news gathering and made no promises to the plaintiff in exchange for the receipt of valuable information. Rather, in *Cantrell,* the plaintiff's complaint was directed at the inaccuracies and untruths in the published news story. Here, the Defendants entered into a contract with the Plaintiff where the hornbook elements of offer, acceptance and consideration were unmistakably present. The Defendants then breached that contract after thoroughly considering what they were about to do. The complained-of acts in *Cantrell,* i.e., inaccuracies and untruths, are very clearly analogous to a defamation claim, wherein the United States Supreme Court has properly clothed the press with a quasi-privileged status and has required plaintiffs to meet a more strenuous burden of proof.

However, where there is no claim of libel or slander, or facts analogous thereto (as is the case here) courts have made it clear that no First Amendment interest exists in protecting news media from "calculated misdeeds". See, e.g., *Time, Inc. v. Hill,* 385 U.S. 374, 389-390 and 384n.9.

Certainly, the knowing and willful breach of a legally sufficient contract after hours of thought and discussion by corporate officers can fairly be characterized as a "calculated misdeed." Just as "[t]he First Amendment has never been construed to accord newsmen immunity from torts or crimes committed during the course of news gathering", *Dietemann v. Time, Inc.,* 449 F.2d 245, 249 (9th Cir. 1971), it similarly should not be construed to immunize news organizations from the application of other aspects of the civil law. To do so would be to trivialize the First Amendment and weaken its capacity to protect true freedom of expression.

The newspapers finally have argued that holding them responsible to the law of contracts will somehow chill freedom of expression guaranteed by the First Amendment. In that regard, it is the Court's view that to deny an injured Plaintiff recovery for demonstrated harm done to him by the breach of an otherwise valid contract would be to deprive that citizen of the protection of the law without any countervailing benefit to the legitimate interest of the public in being informed. Rather than chill freedom of expression, such a result would "encourage conduct by news media that grossly offends ordinary men." *Dietemann* at 250.

FJK

STATE OF MINNESOTA DISTRICT COURT
County of Hennepin Fourth Judicial District

Court File No. 798806

Dan Cohen,

Plaintiff,

vs.

Cowles Media Company, a corporation, d/b/a Minneapolis Star and Tribune Company and Northwest Publications, Inc., a corporation,

Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDER FOR JUDGMENT

The above-entitled matter came duly before the Court for trial by jury of six persons commencing on July 5, 1988. James Fitzmaurice, Esq., appeared on behalf of Defendant Cowles Media; Paul Hannah, Esq., appeared on behalf of Defendant Northwest Publications; Elliot Rothenberg, Esq., appeared on behalf of Plaintiff. The trial concluded on July 20, 1988 with submission of the case to the jury on a special verdict. On July 22, 1988, the jury returned its special verdict which is accepted and adopted by the Court and attached hereto as the Findings of Fact.

The Court hereby makes its:

CONCLUSIONS OF LAW

1. Judgment is entered against Defendants jointly and severally in favor of Plaintiff in the amount of $200,000.00.

2. Judgment is entered against Defendant Cowles Media in favor of Plaintiff in the amount of $250,000.00.

3. Judgment is entered against Defendant Northwest Publications, Inc. in favor of Plaintiff in the amount of $250,000.00.

4. Plaintiff is entitled to judgment for his costs and disbursements herein.

5. Entry of judgment is stayed for 30 days.

ORDER FOR JUDGMENT

LET JUDGMENT BE ENTERED ACCORDINGLY.
Dated: 9 Aug 88

BY THE COURT:
/s/ FRANKLIN J. KNOLL

STATE OF MINNESOTA DISTRICT COURT
County of Hennepin Fourth Judicial District

Court File No. 798806

Dan Cohen,

Plaintiff,

vs.

Cowles Media Company, a corporation, d/b/a Minneapolis Star and Tribune Company and Northwest Publications, Inc., a corporation,

Defendants.

SPECIAL VERDICT

We, the jury, for our verdict in this matter, find as follows:

BREACH OF CONTRACT CLAIMS

1. Was there a valid oral contract between plaintiff Dan Cohen and defendant Minneapolis Star and Tribune?

   Yes ☒ No ___

2. If your answer to Question No. 1 was "Yes", then answer this question:

   Did defendant Minneapolis Star and Tribune breach that contract?

   Yes ☒ No ___

3. If your answer to Question No. 2 was "Yes", then answer this question:

   Was the breach of contract a direct cause of damage to plaintiff?

   Yes ☒ No ___

4. Regardless of your answers to Questions 1-3, answer this question:

   Was there a valid oral contract between plaintiff Dan Cohen and defendant St. Paul Pioneer Press Dispatch?

   Yes ☒ No ___

5. If your answer to Question No. 4 was "Yes", then answer this question:

   Did defendant St. Paul Pioneer Press Dispatch breach that contract?

   Yes ☒ No ___

6. If your answer to Question No. 5 was "Yes", then answer this question:

   Was the breach of contract a direct cause of damage to plaintiff?

   Yes ☒ No ___

MISREPRESENTATION CLAIM

7. Did defendant Minneapolis Star and Tribune make any false representations of fact to plaintiff Dan Cohen?

   Yes ☒ No ___

8. If your answer to Question No. 7 was "Yes", then answer this question:

   Were the false representations of fact made by defendant Minneapolis Star and Tribune misrepresentations of a material fact?

   Yes ☒ No ___

9. If your answer to Question No. 8 was "Yes", then answer this question:

   Did defendant Minneapolis Star and Tribune make a false respresentation of fact with knowledge that the representation was false when they made it?

   Yes ☒ No ___

10. If your answer to Question No. 9 was "Yes", then answer this question:

    Did defendant Minneapolis Star and Tribune make a false representation of fact to plaintiff with the intention of inducing plaintiff to rely upon that representation?

    Yes ☒ No ___

11. If your answer to Question No. 10 was "Yes", then answer this question:

    Did plaintiff Dan Cohen reasonably rely upon the misrepresentation of fact made by defendant Minneapolis Star and Tribune?

    Yes ☒ No ___

12. If your answer to Question No. 11 was "Yes", then answer this question:

    Were the misrepresentations of fact made by defendant Minneapolis Star and Tribune a direct cause of damage to plaintiff Dan Cohen?

    Yes ☒ No ___

13. Regardless of your answers to Questions 7-12, answer this question:

    Did defendant St. Paul Pioneer Press Dispatch make any false representations of fact to plaintiff Dan Cohen?

    Yes ☒ No ___

14. If your answer to Question No. 13 was "Yes", then answer this question:

    Were the false representations of fact made by defendant St. Paul Pioneer Press Dispatch misrepresentations of a material fact?

    Yes ☒ No ___

15. If your answer to Question No. 14 was "Yes", then answer this question:

    Did defendant St. Paul Pioneer Press Dispatch make false representation of fact with knowledge that the representation was false when they made it?

    Yes ☒ No ___

16. If your answer to Question No. 15 was "Yes", then answer this question:

    Did defendant St. Paul Pioneer Press Dispatch make a false representation of fact to plaintiff with the intention of inducing plaintiff to rely upon that representation?

    Yes ☒ No ___

17. If your answer to Question No. 16 was "Yes", then answer this question:

    Did plaintiff Dan Cohen reasonably rely upon the misrepresentation of fact made by defendant St. Paul Pioneer Press Dispatch?

    Yes ☒ No ___

18. If your answer to Question No. 17 was "Yes", then answer this question:

    Were the misrepresentations of fact made by defendant St. Paul Pioneer Press Dispatch a direct cause of damage to plaintiff Dan Cohen?

    Yes ☒ No ___

DAMAGES

19. Regardless of how you answered any of the above questions, you must answer the following question:

    What sum of money, if any, will fairly and adequately compensate the plaintiff Dan Cohen for his loss?

    $200,000.00

PUNITIVE DAMAGES

20. If your answer to Question No. 12 was "Yes", then answer this question:

    Do you find by clear and convincing evidence that the conduct of defendant Minneapolis Star and Tribune showed a willful indifference to the rights of plaintiff Dan Cohen?

    Yes ☒ No ___

21. If your answer to Question No. 20 was "Yes", then answer this question:

    What sum of money should be awarded to the plaintiff Dan Cohen as punitive damages against the defendant Minneapolis Star and Tribune?

    $250,000.00

22. If your answer to Question No. 18 was "Yes", then answer this question:

    Do you find by clear and convincing evidence that the conduct of defendant St. Paul Pioneer Press and Dispatch showed a willful indifference to the rights of plaintiff Dan Cohen?

    Yes ☒ No ___

23. If your answer to Question No. 22 was "Yes", then answer this question:

    What sum of money should be awarded to plaintiff Dan Cohen as punitive damages against defendant St. Paul Pioneer Press and Dispatch?

    $250,000.00

The undersigned have agreed with this verdict.
Dated: 7/22/88

FOREPERSON
Lydia Brichta
Mary C. Fuller
John Tapsak
Lisa I. Lang
Connie Marsh

STATE OF MINNESOTA
County of Hennepin

DISTRICT COURT
Fourth Judicial District

Dan Cohen,

Plaintiff,

vs.

Cowles Media Company, a corporation, d/b/a Minneapolis Star and Tribune Company and Northwest Publications, Inc., a corporation,

Defendants.

ORDER AND MEMORANDUM
File No. 798806

The above-entitled matter came on for hearing on the 6th day of February, 1987, before the undersigned Judge of the District Court on motion by Defendants for summary judgment or, in the alternative, to dismiss Plaintiff's action.

Elliot Rothenberg, Esq., appeared for and on behalf of the Plaintiff; Patricia Hirl, Esq., appeared for and on behalf of Defendant Cowles Media Company; Paul Hannah, Esq.,

appeared for and on behalf of Defendant Northwest Publications, Inc.

Upon all the files, records, proceedings and arguments of counsel herein,

IT IS HEREBY ORDERED, That:

1. Defendants' motion for summary judgment be and hereby is denied in its entirety.

2. Defendants' motion to strike Plaintiff's claim for punitive damages is granted as to the breach of contracts claim (*Barr/Nelson Inc. v. Tonto's, Inc.*, 336 N.W.2d 46, 52-53).

3. Defendants' motion to strike Plaintiff's claim for punitive damages be and hereby is denied as to the misrepresentation claim.

4. Defendants' motion for dismissal of Plaintiff's claim be and hereby is denied.

5. The attached Memorandum be and hereby is incorporated herein by reference.

Dated: 19 June 87.

BY THE COURT:
/s/ FRANKLIN J. KNOLL

MEMORANDUM

The Court, in this case, is faced with an intriguing argument advanced by the State's two largest newspaper organizations. The newspapers seek, not vindication of the often-invoked right to shield the identity of their sources from

public disclosure, but rather the summary determination of this Court that they may not be held to contractual commitments to refrain from disclosing the identity of their sources. The newspapers seek the right, not to shield, but to disclose, in the face of their prior agreement not to disclose. Indeed, Defendants' counsel have advanced the argument that the First Amendment of the United States Constitution immunizes them from liability for breach of an otherwise valid contractual commitment to provide anonymity to its sources in return for the provision of information.

Defendants Cowles Media Company and Northwest Publications, Inc., publishers of the Minneapolis Star and Tribune and the St. Paul Pioneer Press, respectively, seek summary judgment or, in the alternative, dismissal of the Plaintiff's claims. Defendants have also moved the Court to strike the Plaintiff's claim for punitive damages.

The case arises on the following facts. On Wednesday, October 27, 1982, the Plaintiff Dan Cohen, contacted reporters of four local news organizations. At separate meetings with each reporter, Cohen offered to provide information concerning a prior misdemeanor conviction of a candidate for state-wide office, information not then publicly known. Cohen offered to provide this information on the explicit condition that his identity not be disclosed by the news organizations. The reporters, including those employed by the Minneapolis Star and Tribune and the St. Paul Pioneer Press, accepted the information and in return gave their commitment not to disclose the identity of its source.

Editors of the St. Paul Pioneer Press and the Minneapolis Star and Tribune determined later to override the reporters' promise not to identify Cohen and published the story, naming Cohen as its source. Cohen then brought this suit

in December of 1982, its amended complaint alleging breach of contract and fraudulent misrepresentation. The complaint also seeks punitive damages.

SUMMARY JUDGMENT ON PLAINTIFF'S BREACH OF CONTRACT CLAIMS IS NOT APPROPRIATE

The Defendants argue that Cohen's breach of contract claim should be summarily dismissed, arguing that the agreement with Cohen violates the statute of frauds and is therefore unenforceable as a matter of law. Minnesota Statutes, Section 513.01, Minnesota's statute of frauds, provides in relevant part as follows:

> No action shall be maintained, in either of the following cases, upon any agreement, unless such agreement or note or memorandum thereof, expressing the consideration, is in writing, and subscribed by the party therewith:
>
> (1) Every agreement that by its terms is not to be performed within one year from the making thereof; . . . .

Rule 56.03 of the Minnesota Rules of Civil Procedure provides that summary judgment is appropriate only where there are no material facts in dispute and one party is entitled to judgment as a matter of law. In ruling on a motion for summary judgment it is not the Court's function to resolve issues of fact; rather, the Court's function is limited to determining whether there exists an issue of fact to be tried. *Anderson v. Twin City Rapid Transit Co.*, 250 Minn. 167, 84 N.W.2d 593 (1957). All doubt and factual inferences must be resolved against the moving party and in favor of the non-moving party. *Nord v. Herreid*, 305

N.W.2d 337 (Minn. 1981). The Court's opinion as to the likelihood of a particular party prevailing at trial is not a criterion as to whether summary judgment should be granted. See, *Dempsy v. Jarosack*, 290 Minn. 405, 188 N.W.2d 286 (Minn. 1983). Summary judgment may only be granted where it is "perfectly clear that there exist no fact issues material to a resolution of the issues involved in the cause of action." *Donnay v. Boulware*, 275 Minn. 37, 144 N.W.2d 711, 716 (1966). However, where the facts material to the resolution of the litigation are not in dispute and as a matter of law compel only one conclusion, summary judgment is appropriate. *Illinois Farmers Insurance Co. v. Tapemark Co.*, 273 N.W.2d 630 (Minn. 1978).

While it is true, as Defendants assert, that an agreement which by its terms cannot be performed within one year must be in writing to meet the statute of frauds, the provision of the statute pertains only to those contracts whose performances *cannot possibly* be completed within a year. *Braaten v. Midwest Farm Shows*, 360 N.W.2d 455 (Minn. App. 1985); Restatement (Second) of Contracts, Section 130, comment a (1981) (hereinafter "Restatement"). Thus, contracts of uncertain duration are simply excluded from the statute. The Restatement provides the following illustrative example:

> A orally promises to work for B, and B promises to employ A during A's life at a stated salary. The promises are not within the one-year provision of the statute, since A's life may terminate within a year.

Because a strict construction of the statute of frauds would be likely to lead to hardship and injustice, the result has

been a tendency by Courts toward a narrow construction of the statute. Accordingly, the Plaintiff should be given the opportunity to demonstrate to the trier of fact *the possibility* that his agreement with the Defendants was capable of completion within one year.

Additionally, a well recognized interpretation of the one-year provision of the statute provides that the statute does not apply to a contract which is performed by one party at the time it is made, or to one which may be performed by one of the parties within a year. *Landan v. Iverson,* 78 Minn. 299, 80 N.W. 1051 (1899); Restatement, Section 130 comment d. In *Landan,* which has not been overruled, the Minnesota Supreme Court pronounced: "The statute applies only to contracts which are not to be performed upon either side within a year. If all that is to be performed on one side is to be performed within a year the contract is not within the statute. *Id.* at 1052. Here, facts established in Plaintiff's affidavits demonstrate that he delivered the information to the reporters. No additional performance was required of him pursuant to the agreement. In accordance, then, with the rule in *Landan,* and the comment of the Restatement, the agreement at bar appears to fall outside of the purview of the statute of frauds.

Finally, the statute of frauds provides that if the agreement "or some note or memorandum thereof" is in writing, the agreement is outside the purview of the statute. In this regard, the Restatment teaches as follows:

> "Writing" for this purpose includes any intentional reduction to tangible form. Commend d to Section 131. There is no requirement that the memorandum be communicated or delivered to any other party to the

> contract, or even that it be known to him or anyone but the signer. Comment b to Section 133.
>
> The signature to a memorandum may be any symbol made or adopted with an intention, actual or apparent, to authenticate the writing as that of the signer. Section 134.
>
> The signature need not appear on any particular part of the writing. . . . A printed letterhead or billhead may be adopted as a signature. Comment b to Section 134.
>
> The memorandum sufficient to satisfy the statute may be made or signed at any time before or after the formation of the contract. Section 136.
>
> There is no requirement that the memorandum be made contemporaneously with the contract. It may be made even after breach of repudiation. Comment b to Section 136.

The Court concludes that authoritative construction of the statute of frauds is broad enough to support a finding that the publication by both the Minneapolis Star and Tribune and the St. Paul Pioneer Press of the essential elements of Cohen's agreement with those newspapers constitutes a memorandum in writing sufficient to excise the agreement from the requirements of the statute.

In accordance with the above discussion, the Defendants' motion for summary judgment has been denied. This conclusion clearly flows from the Court's considering the facts, as it must, in a light most favorable to the non-moving party.

SUMMARY JUDGMENT ON PLAINTIFF'S MISREPRESENTATION CLAIM IS NOT APPROPRIATE

The Plaintiff claims that the "revocation" by the editors of the reporters' commitment not to disclose Cohen's identity constituted actionable misrepresentation. The Defendants seek summary judgment, arguing that the reporters' promises of anonymity are unactionable as a matter of law under two theories: first, that the promises constituted nothing more than good faith promises of performance in the future; second, that no evidence exists to suggest that the reporters did not intend to perform at the time the promises were made. In response, the Plaintiff argues that the Defendants, through their reporters, falsely represented that the reporters possessed the authority to bind their employers and that the Defendant newspapers (in contrast to the reporters) at no time had any intention of performing the agreement made on their behalf. (The Court notes that the reporters are not parties defendant to this action.) Defendants' memorandum is devoid of any discussion of the agency relationship between the reporters and their newspapers, and fails to point out that the reporters are not defendants to the action.

It is well settled that an act of an agent authorized by the principal constitutes the act of the principal. *Mackenzie v. Ryan*, 41 N.W.2d 878, 230 Minn. 378 (1950). It is also well settled that if an agent with a principal's knowledge and acquiescense makes false representations, and the principal remains silent, then the principal is responsible for the misrepresentation. *Perkins v. Orfield*, 145 Minn. 68, 176 N.W.2d 157 (1920). In the case at bar, it appears that the reporters were acting as the newspapers' agents, and the

Court must assume so for purposes of this motion. What is less clear is the scope of the reporters' authority with regard to making agreements to shield their sources. The determination of the authority as an agent is ordinarily in question of fact for the jury. *Gulbrandson v. Empire Mutual Ins. Co.*, 251 Minn. 387, 87 N.W.2d 850 (1958).

The first issue raised by Plaintiff's misrepresentation claim is whether the reporters misrepresented the scope of their authority by leading Cohen to believe that his identity would be shielded. As the Court has observed, questions as to the scope of an agent's authority are properly resolved by the trier of fact. *Gulbrandson, supra.*

A second issue inherent in the Plaintiff's misrepresentation claim is whether the newspapers are liable because *they* (rather than the reporters) at no time intended to perform the commitment made on their behalf by their agents. In Minnesota, the general rule is that to be actionable, a misrepresentation must relate to a past or existing fact and cannot ordinarily be predicated on representations which are mere promises or statements of an intention unperformed. *Dollar Travel Agency, Inc. v. Northwestern Airlines, Inc.*, 354 N.W.2d 880 (Minn. App. 1984). However, promises of intention to perform in the future may be actionable under Minnesota law if it can be demonstrated that the representors "from the start, never intended to fulfill their assurances." *Wood v. Schlagel*, 375 N.W.2d 531 (Minn. App. 1985). Stated another way, the statement of a representor's intention to do something, or of his or her expectation as to a matter *in futuro*, is a representation of the then existence of such intention, and is thus a statement of fact and not merely a promise. *Guy T. Bisbee Company v. Granite City Investment Company*, 159 Minn. 238, 199 N.W. 14 (1944).

The question of whether the representor here intended to stand by the commitment made to Cohen is one which must be determined from the circumstances surrounding the commitment, and as such is properly reserved for the finder of fact. In this regard, authorities have observed that repudiation of a promise soon after it is made with no intervening change in the circumstances constitutes evidence of an intention not to perform. Prosser and Keaton, *The Law of Torts*, Section 109 at 764 (95th Ed. 1984).

THE FIRST AMENDMENT DOES NOT IMMUNIZE THE DEFENDANTS FROM THE CONSEQUENCES OF BREACHING AN OTHERWISE VALID CONTRACT

In considering the Defendants' First Amendment argument for summary judgment, the Court must assume that the agreement between Cohen and the reporters constituted a legally binding contract. As was made clear in the oral argument on this motion. the Defendants are arguing that parties who enter into otherwise valid contractual relationships with newspaper organizations, such as an agreement to maintain the confidentiality of a news source in exchange for the news story, may not rely on the newspaper's promise to perform, even though that party may have performed fully his or her part of the bargain. This is so, Defendants argue, because to require the newspaper to perform its agreement would somehow operate to censor the news in violation of the First Amendment's guarantees of a free press. Defense counsel vehemently argued that even if the newspapers' breach could be shown to be the proximate cause of demonstrable damages to a plaintiff, that plaintiff should have no recourse because the First Amendment

will not permit it. In fact, in response to a question by the Court, counsel for the Minneapolis Star and Tribune replied that such a plaintiff should take his or her complaint with its attendant damages to the Minnesota Press Council.

While this Court has long been committed to the proposition that newspapers should not be inhibited or impeded from printing the truth, this Court will not adopt the premise that the First Amendment should operate to excuse news organizations from the consequences of a decision to publish when that decision involves the breach of a valid contract or of the general tort laws.

The Defendants cite several well-known decisions of the United States Supreme Court in their position. These include: *New York Times Company v. Sullivan*, 376 U.S. 254 (1964); *Smith v. Daily Mail Publishing Company*, 443 U.S. 97 (1979); *Landmark Communications, Inc. v. Commonwealth of Virginia*, 435 U.S. 829 (1978); *Cox Broadcasting Corporation v. Cohn*, 420 U.S. 469 (1975). Most, if not all of the authorities cited by the Defendants involve instances where information was obtained by lawful means. To this Court's knowledge, the United States Supreme Court has never interpreted the First Amendment so as to protect news organizations from the results of unlawful conduct. In that regard, in *Bransburg v. Hayes*, 408 U.S. 665 (1972), the United States Supreme Court observed:

> The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others.

Id. at 683. Similarly, the Ninth Circuit, interpreting the Supreme Court's landmark ruling in *New York Times Company v. Sullivan, supra,* a case heavily relied on by the Defendants, observed:

> Indeed, the [Supreme] Court strongly indicates that there is no First Amendment interest in protecting news media from calculated misdeeds. No interest protected by the First Amendment is adversely affected by permitting damages or intrusion to be enhanced by the fact of later publication of the information that the publisher improperly acquired.

Dietemann v. Time, Inc., 449 Fed.2d 245, 250 (9th Cir. 1971).

This Court can perceive no constitutional dimension in the case at bar. This is not a case about free speech, rather it is one about contracts and misrepresentation. The views of the Second Circuit in *Galella v. Onassis,* 487 Fed.2d 486, 995-96 (2d Cir. 1973) are appropos: ". . . There is no threat to a free press in requiring its agents to act within the law."

/s/ FK
6/19/87